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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises, prepared pursuant to Council resolutions 17/4 and 26/22. In the report, the Working Group examines the duty of States to protect against human rights abuses involving those business enterprises that they own or control, which are generally referred to as State-owned enterprises. Many States the world over manage large State-owned enterprise portfolios and those enterprises have emerged as significant actors in the global economy. State-owned enterprises can have important human rights impacts, both positive and negative. Yet, not enough attention has been paid to their human rights responsibilities and impacts, nor to the duties of States in this regard.

The report calls attention to and clarifies what States are expected to do in their role as owners of enterprises and why. The starting point is principle 4 of the Guiding Principles on Business and Human Rights, which provides that States should take "additional" steps to protect against human rights abuses by business enterprises that are owned or controlled by the State. The report highlights the persuasive reasons for additional action to be taken by States in this regard, including policy coherence, legal obligations, reputation and credibility.

The Guiding Principles do not specify what steps States should take. In the present report, the Working Group suggests a range of measures that States could take to operationalize the call to take additional steps with regard to State-owned enterprises, by building on existing international guidance and national practices related to the corporate governance of those enterprises.

In working to ensure that all business enterprises respect human rights, there are compelling reasons for States to lead by example and to do their utmost to ensure that the enterprises under their ownership or control fully respect human rights. The Working Group calls on States to demonstrate that leadership.

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I. Introduction

A. Background, aims and outline of the report

1. In the present report, the Working Group on the issue of human rights and transnational corporations and other business enterprises examines the duty of States to protect against human rights abuses involving those business enterprises that they own or control, which are generally referred to as State-owned enterprises.

2. The starting point for the present discussion is the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework.[1] Since their unanimous endorsement by the Human Rights Council in 2011, the Guiding Principles have become the authoritative global reference for preventing and addressing adverse human rights impacts arising from business-related activity, including by State-owned enterprises. Guiding principle 4 provides that States should take "additional" steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, as well as by other entities such as export credit agencies that are seen as being closely associated with the State. Guiding principle 4 does not, however, clarify what these steps might be.

3. Why are States explicitly expected to take additional action to protect against human rights abuses by State-owned enterprises? Is it not sufficient that States are required to take appropriate steps to ensure that all companies, irrespective of structure and ownership, respect human rights? And what are the normative, policy and practical implications of guiding principle 4? These are some of the questions that the present report will address.

4. The Working Group considers that it is important to clarify the particular duties of States with respect to the enterprises that they own or control. This goes to the core of how a State should behave in its role as owner of companies and the ways in which its ownership model is aligned with its international human rights obligations. In the present report, the Working Group will highlight the compelling reasons why States should take additional action in this regard,[1] including policy coherence, legal obligations, reputation and credibility.

5. The Working Group notes a general lack of attention, in practice, on the part of States and other actors to the implications of guiding principle 4 with respect to State-owned enterprises. Policies, guidelines and good practices are lacking at both the national and international levels. Governance and protection gaps exist, which must be addressed.

6. Thus, the present report has two objectives: first, to call attention to and clarify what States are expected to do under the Guiding Principles regarding the enterprises that they own or control and why; and second, to help States to better implement the Guiding Principles by suggesting a range of measures that they could take to operationalize the requirement of additional steps to ensure that State-owned enterprises respect human rights.

7. Section I of the report discusses the state of play of State-owned enterprises, their definitions and the scope of the report. Section II discusses the normative and policy implications of guiding principle 4 and the reasons behind the call on States to take additional steps. Section III highlights a range of measures that States could and should take to operationalize the call to take additional steps. The report ends with concrete recommendations to States and other stakeholders.

[1] See A/HRC/17/31, annex.

8. The Working Group would like to thank the States that responded to its questionnaire on the role of States as economic actors.[2] Their responses, when relevant to State-owned enterprises, have been used to inform the present report. Not many States responded to the questionnaire, thus the geographic scope of information available for the report is limited. However, efforts have been made to expand the geographic scope of the report (see section III) and the Working Group welcomes information from the States that have relevant practices not referred to in the present report. The Working Group intends to follow up on these issues, including at the fifth annual Forum on Business and Human Rights to be held in Geneva in November 2016. It looks forward to cooperating further on these issues with States, State-owned enterprises and other interested partners.

B. Defining State-owned enterprises

9. Countries differ greatly with respect to the range of entities that they consider as State-owned enterprises. For the purposes of the present report, the Working Group uses the definition contained in the OECD Guidelines on Corporate Governance of State-Owned Enterprises,[3] which reads as follows:

> Any corporate entity recognized by national law as an enterprise, and in which the State exercises ownership, should be considered as a State-owned enterprise. This includes joint stock companies, limited liability companies and partnerships limited by shares. Moreover statutory corporations, with their legal personality established through specific legislation, should be considered as State-owned enterprises if their purpose and activities, or parts of their activities, are of a largely economic nature (p. 15).

10. The OECD Guidelines on Corporate Governance of State-Owned Enterprises clarifies the relationship between ownership and control and places emphasis on effective control:

> the Guidelines apply to enterprises that are under the control of the State, either by the State being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control. Examples of an equivalent degree of control would include, for instance, cases where legal stipulations or corporate articles of association ensure continued State control over an enterprise or its board of directors in which it holds a minority stake (ibid.).

11. Thus, there might be cases where a State, as a minority shareholder, does exercise effective control and, as a result, the OECD Guidelines on Corporate Governance of State-Owned Enterprises and principle 4 of the Guiding Principles would apply.

C. State-owned enterprises: state of play

12. State-owned enterprises are important players in domestic markets and increasingly so in the global economy. Despite waves of privatization in the 1980s and 1990s, many States still manage large State-owned enterprises portfolios. Over the past decade, the

[2] They are: Brazil, Chile, Colombia, Cuba, Cyprus, Denmark, France, Georgia, Ghana, Italy, Kenya, Norway, Republic of Korea, Sweden, Switzerland, Kyrgyzstan, Netherlands, Russian Federation, United Kingdom of Great Britain and Northern Ireland, United States of America. All responses are available as received at www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx.

[3] Organization for Economic Cooperation and Development, *OECD Guidelines on Corporate Governance of State-Owned Enterprises, 2015 Edition* (Paris, 2015).

influence of State-owned enterprises has also been on the rise in the global economy. The proportion of State-owned enterprises among the Fortune Global 500 companies is estimated to have grown from 9.8 per cent in 2005 to 22.8 per cent in 2014, with US$ 389.3 billion in profits and US$ 28.4 trillion in assets. This rise is driven primarily by developing economies, in particular China.[4] These figures only comprise publicly listed companies, thus, the overall share of State-owned enterprises in the global economy is likely to be greater.

13. Traditionally, State-owned enterprises have had a solely national focus on sectors considered of national importance, such as energy, infrastructure and public utilities. Nowadays, State-owned enterprises, while still present in these sectors, are also active in a large range of sectors, such as finance.[5] They also increasingly operate globally. In 2014, for instance, there were at least 550 State-owned transnational corporations, both listed and unlisted, from developed and developing countries. While the number is relatively small, the number of their foreign affiliates and the scale of their foreign assets are significant, with over 15,000 foreign affiliates and estimated foreign assets of over US$ 2 trillion.[6] In addition, State-owned enterprises are increasingly active in mergers and acquisitions of companies worldwide.[7]

14. The rationale for State ownership has varied over time and is multifaceted, with reasons including providing public goods, fostering industries that would not be developed through private investment, generating government revenue and functioning as a crisis response tool.[8] In addition to their commercial activities, some State-owned enterprises are also tasked with fulfilling specific public policy outcomes. State-owned enterprises are owned not only by central or federal Governments, but also by local and sub-regional governments.

15. Concerns have been raised that the advantages enjoyed by such enterprises owing to their relationship with State agencies, such as direct subsidies, preferential regulatory treatment and State-backed guarantees, lead to their being less transparent, accountable or efficient, enjoying a position of market domination and operating with higher levels of impunity.[9] Against this backdrop, there has been a trend to reform the sector and encourage

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[4] Only entities in which the Government held 50 per cent or more shares were considered. See G. Kwiatkowski and P. Augustynowicz, "State-owned enterprises in the global economy – analysis based on Fortune Global 500 list", *Managing Intellectual Capital and Innovation for Sustainable and Inclusive Society: Proceedings of the MakeLearn and TIIM International Conference*, (Bari, Italy, 27-29 May 2015), pp. 1739-1747); and Przemyslaw Kowalski and others, "State-owned enterprises: trade effects and policy implications", *OECD Trade Policy Paper* No. 147 (22 March 2013), pp. 5 and 188.

[5] Kwiatkowski and Augustynowicz, "State-owned enterprises in the global economy", p. 1744 (see footnote 4).

[6] United Nations Conference on Trade and Development (UNCTAD), *World Investment Report: Investing in the SDGs: An Action Plan* (New York and Geneva, 2014), pp. 20-21. State-owned transnational corporations are defined here as corporations that are at least 10 per cent owned by the State or public entities, or in which the State or public entity is the largest shareholder or has a "golden share" (p. 34).

[7] For instance, in the European Union, State-owned enterprises accounted for 70 per cent of the total Chinese investment in 2015. Thilo Hanemann and Mikko Huotari, "A new record year for Chinese outbound investment in Europe" (Mercator Institute for China Studies, February 2016), p. 5.

[8] Kowalski and others, "State-owned enterprises", pp. 11-13 (see footnote 4).

[9] See for example, Kowalski and others, "State-owned enterprises", p. 4; Arief Budiman, Diaan-Yi Lin and Seelan Singham, "Improving performance at state-owned enterprises", (McKinsey & Company, May 2009), available at www.mckinsey.com/industries/public-sector/our-insights/improving-performance-at-state-owned-enterprises; and Institute for Human Rights and Business, "Human rights

the efficient, transparent and accountable performance of State-owned enterprises. International guidelines on corporate governance have been developed to that end (see section II below).

16. Concerns have also been raised about the apparent lack of awareness of many State-owned enterprises of their responsibility to respect human rights and their poor performance in this regard. A study by the Business and Human Rights Resource Centre on the human rights commitments of companies showed that, of the 180 companies contacted between 2014 and 2015, State-owned enterprises were the least responsive.[10] Although the picture is mixed, with a number of State-owned enterprises having made commitments on human rights,[11] allegations of human rights abuses by such enterprises in their home countries and in their operations abroad have been documented, including labour-related abuses, environmental damage, land rights violations and intimidation and defamation of human rights defenders.[12]

17. Reports of human rights abuses, and companies' listings of human rights or environmental, social and corporate governance performance, tend not to differentiate between private companies and State-owned enterprises, which makes it difficult to ascertain the human rights performance of those enterprises overall. Also, State-owned enterprises' respect for human rights can depend on varying degrees of both State requirements and other incentives, such as industry standards.

D. Scope and limits of the report

18. In addition to State-owned enterprises, guiding principle 4 explicitly mentions entities that are closely associated with the State, such as export credit agencies and official investment insurance or guarantee agencies as well as development agencies and development finance institutions. However, discussion of these entities is not within the scope of the present report.

19. The report focuses only on State-owned enterprises, in the traditional sense. It does not include sovereign wealth funds,[13] which, although not explicitly mentioned in guiding principle 4, fall under the category of businesses that are owned or controlled by the State. Sometimes considered a special type of State-owned enterprise, what matters is that they are owned or controlled by the State, regardless of their precise corporate form. Sovereign wealth funds have emerged as a significant force in global finance, managing assets estimated to be close to US$ 6.4 trillion in 2014.[14]

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in the political economy of states: avenues for application", *State of Play* series No. 3 (March 2014), p. 51.

[10] See Business and Human Rights Resource Centre, "Action on business and human rights: Where are we now? - Key findings from our Action Platforms (March 2015), p. 4.

[11] By 1 April 2016, 242 State-owned enterprises out of around 8,700 self-reported business participants had joined the United Nations Global Compact initiative (actual number may differ slightly as this is based on self-reporting of State-owned status). Database available at unglobalcompact.org.

[12] See Human Rights and Business Dilemmas Forum, "Working with SOEs", available at www.hrbdf.org/dilemmas/working-soe/#.Vp-yFU3bLIU; and information on the Business and Human Rights Resource Centre website, www.business-humanrights.org/.

[13] See the Santiago Principles, available at: http www.iwg-swf.org/pubs/eng/santiagoprinciples.pdf.

[14] UNCTAD, *World Investment Report* 2014 pp. xvii-xviii (see footnote 6).

20. Given the potential impacts and leverage that all of the above-mentioned enterprises have on human rights,[15] the Working Group encourages stakeholders to give priority to their human rights responsibilities and those of the associated States.

21. In the same vein, it is worth recalling that guiding principle 4 is part of what the Guiding Principles call the "State-business nexus", which also encompasses Principles 5 and 6. The State-business nexus includes situations where the State is an economic actor in its own right, when it contracts or otherwise engages with companies to provide services that may impact on human rights, or when it conducts commercial transactions (procurement) with companies. These issues are beyond the scope of the present report, but deserve more attention.

II. Normative and policy framework underpinning State action in relation to State-owned enterprises

A. State duty to protect against abuse by State-owned enterprises

1. Requirement to take "additional" steps

22. The Guiding Principles make it clear that, in relation to the State duty to protect, States should do more than simply treat State-owned enterprises as any other business enterprise. Guiding principle 4 requires that "States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, ... including, where appropriate, by requiring human rights due diligence". However, the Guiding Principles do not specify what those steps should be. The Working Group makes suggestions to that effect in section III of the present report.

23. The additional steps to be taken can be understood as measures in addition to those outlined in Principles 1 to 3, which are applicable to all companies. These principles require States to take appropriate steps to prevent, investigate, punish and redress human rights abuses by businesses, as well as clearly set expectations with regard to respect for human rights and discharge their obligations through various regulatory and policy actions.

24. The international policy framework is moving towards reinforcing the call made in principle 4. In a recent recommendation, the Council of Europe Committee of Ministers recommended that "Member States should apply additional measures to require business enterprises to respect human rights, including, where appropriate, by carrying out human rights due diligence, that may be integrated into existing due diligence procedures, when member States ... own or control business enterprises".[16]

25. However, the requirement to take additional steps does not mean that States should be any less concerned about protecting against abuses by private enterprises. The ultimate goal is to achieve full respect for human rights by all enterprises, irrespective of ownership. The requirement emphasizes that States, as owners of enterprises, should use the additional means at their disposal to protect against abuse.

[15] Note recent positive developments in this regard with the adoption in March 2016 by Norges Bank Investment Management, which manages Norway's Pension Fund, of "Human rights: expectations towards companies", available at www.nbim.no/en/responsibility/risk-management/human-rights.

[16] See recommendation CM/Rec(2016)3 on human rights and business, para. 22.

2. Policy rationale

26. The Guiding Principles and their commentaries explicitly set out the reasons why greater expectations are placed on States in relation to enterprises that they own or control. These relate to the close relationship between the State and the enterprise, the means at the disposal of the State for monitoring and ensuring respect for human rights and leverage. The commentary to principle 4 recalls that, the closer a business enterprise is to the State, or the more it relies on statutory authority or taxpayer support, the stronger the State's policy rationale becomes for ensuring that the enterprise respects human rights. Where States own or control business enterprises, they have greatest means within their power to ensure that relevant policies, legislation and regulations regarding respect for human rights are implemented. Senior management typically reports to State agencies and associated government departments have greater scope for scrutiny and oversight, including ensuring that effective human rights due diligence is implemented.

27. It is thus a matter of policy coherence. Governmental departments and entities tasked with exercising State ownership — often the Ministries of Finance or of Economy — need to be able to act in a manner that is compatible with the overall human rights obligations of the State. The commentary to principle 8 of the Guiding Principles calls on Governments to support and equip departments and agencies that shape business practices to be informed of and act in a manner compatible with these obligations.

28. It is also a matter of legitimacy and credibility. The State should not ask less of companies that are closely associated with it than it asks of private businesses. The human rights record of a State-owned enterprise is often associated with that of the State and vice-versa. There are significant expectations for States to "get their own house in order". In turn, businesses are much more likely to accept directives from the State if they consider that the State is leading by example and ensuring that the entities closest to, if not directly associated with, it respect human rights.

3. International law implications

29. Additional reasons for greater action on the part of States with regard to State-owned enterprises relate to State obligations under international human rights law and general international law.

30. United Nations human rights treaty bodies suggest that States may breach the duty to respect or to protect under international human rights law owing to human rights abuses by State-owned enterprises.[17]

31. Treaty bodies usually refer to the duty to protect against abuse by third parties, including private and State-owned business enterprises. The State could be held responsible for not taking all reasonable steps to prevent, mitigate and remediate the abuse.

32. At times, treaty bodies have also associated the human rights impacts of State-owned enterprises with the State duty to respect, considering such enterprises as quasi-State organs or agents and assuming that they are wholly owned or controlled by the State. The Committee on Economic, Social and Cultural Rights provides that the duty to respect requires the State to refrain from unlawfully polluting air, water and soil, for example through industrial waste from State-owned facilities.[18] The Committee on the Elimination of Discrimination against Women has often called on States to increase the number of

[17] See A/HRC/4/35/Add.1; and the Universal Human Rights Index available at www.uhri.ohchr.org/en.

[18] See the Committee's general comments No.14 (2000) on the right to the highest attainable standard of health, para. 34; No. 15 (2002) on the right to water, para. 21; and No. 23 (2016) on the right to just and favourable conditions of work, para. 58.

women in decision-making positions in State-owned enterprises, equating them to other governmental bodies.[19]

33. There are situations in which the acts of a State-owned enterprise or the nature of its relationship to the State are more clearly associated with the State duty to respect. This is the case when such an enterprise performs public functions — such as managing a prison — or has delegated authority or is contracted to provide public services. In such cases, the State must exercise adequate oversight in order to meet its human rights obligations and ensure respect.[20] All these considerations have particular resonance in the context of the Sustainable Development Goals and national plans to achieve them, given the important role that businesses, including State-owned enterprises, are expected to play.

34. The commentary to guiding principle 4 states that a human rights abuse by a State-owned enterprise may also constitute a violation of the State's own international law obligations when the acts of the enterprise can be attributed to the State. Public international law envisages specific conditions under which private persons or entities which are not State organs according to the internal law of the State concerned may engage the responsibility of the State.[21] Under these rules, abuse by enterprises owned or controlled by the State may be attributable to the State in question. Here, the issue of whether particular business entities are State-owned or not is, however, of less importance in deciding whether their acts are attributable to the State. What matters is whether the business entity is completely dependent on the State, is empowered by law to exercise elements of government function and acts under those powers, or acts under the instructions, direction or control of the State.[22] Nevertheless, given the nature of relationships between State-owned enterprises and States, it is more likely that abuses by a State-owned enterprise could lead to attribution of State responsibility than those by private businesses.

B. State-owned enterprises as business enterprises: the corporate responsibility to respect human rights

35. Although the present report focuses primarily on States' duties with respect to State-owned enterprises, it is important to recall that such enterprises are commercial entities that should respect human rights like any other private enterprise. Guiding principle 14 provides that "the responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, *ownership* and structure" (emphasis added). The same reasoning can be found in the OECD Guidelines for Multinational Enterprises,[23] which are aligned with the Guiding Principles, and the International Labour Organization Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy. Thus, it is clear that Principles 11 to 24, applicable to pillar II of the Guiding Principles, and Principles 29 to 31 under pillar III fully and equally apply to State-owned enterprises.

[19] See CEDAW/C/MAR/CO/5; CEDAW/C/BIH/CO/3; A/56/38, para. 171 (Uzbekistan); and A/57/38, paras. 104 (Estonia) and 150 (Trinidad and Tobago).

[20] See also A/HRC/15/31.

[21] See A/56/10 and Corr. 1 and 2, para. 77; and Olivier de Schutter, "The responsibility of states", in Simon Chesterman and Angelina Fisher, eds., *Private Security, Public Order: The outsourcing of Public Services and Its Limits* (Oxford, Oxford University Press, 2009), pp. 17-37.

[22] See A/56/10 and Corr. 1 and 2, para. 77, arts. 5 and 8.

[23] OECD, *OECD Guidelines for Multinational Enterprises* (Paris, 2011).

36. In addition to the responsibility of State-owned enterprises to respect human rights in the same manner as any private business, they are expected to observe the highest standard of responsible business conduct on par with listed companies. The OECD Guidelines for Multinational Enterprises suggest that public expectation is often higher for multinational State-owned enterprises than for fully private companies: "State-owned multinational enterprises are subject to the same recommendations as privately owned enterprises, but public scrutiny is often magnified when a State is the final owner" (p. 22). The OECD Guidelines on Corporate Governance of State-Owned Enterprises note that State-owned enterprises should observe high standards of transparency and be subject to the same high quality accounting, disclosure, compliance and auditing standards as listed companies (p. 24). Such heightened expectations are reflected in a number of State policies (see section III below).

37. It is important to note that respect for human rights is required for all operations of State-owned enterprises, regardless of whether they are purely commercial or related to specific public purposes. The Guiding Principles are concerned about preventing and addressing adverse human rights impacts throughout all the operations of businesses, including those of State-owned enterprises.

C. Link between corporate governance and human rights

38. In order to ensure international policy coherence and effectiveness, the Working Group considers it essential to build on existing guidelines and models for better governance and accountability of State-owned enterprises in order to enhance the management of their human rights impacts. The OECD Guidelines on Corporate Governance of State-Owned Enterprises and the G20/OECD Principles of Corporate Governance[24] are the most relevant documents to the present discussion. They provide a robust template for governance of State-owned enterprises. They are also closely linked to existing guidance on responsible business conduct and human rights, in particular the OECD Guidelines for Multinational Enterprises and the Guiding Principles on Business and Human Rights. Although approved by OECD member States only, the OECD Guidelines on Corporate Governance of State-Owned Enterprises and the G20/OECD Principles of Corporate Governance, which have also been approved by the Group of 20 (G20), have achieved the rank of an international benchmark and are implemented and promoted beyond OECD member States.[25]

39. The Working Group notes the conceptual and normative links between corporate governance, on the one hand, and responsible business conduct and human rights, on the other. At a fundamental level, all the instruments cover the governance of business. The OECD Guidelines on Corporate Governance of State-owned Enterprises are "recommendations to governments on how to ensure that SOEs operate efficiently, transparently and in an accountable manner" (Foreword). This is very much in line with the aims of guiding principle 4 (with accountability being understood here with reference to human rights impacts).

40. The OECD Guidelines on Corporate Governance of State-Owned Enterprises and the OECD Guidelines for Multinational Enterprises acknowledge their mutual relevance and each suggests that States take into account the other. The Guidelines for Multinational

[24] See OECD, *G20/OECD Principles of Corporate Governance* (Paris, 2015).

[25] Three non-OECD countries — Colombia, Latvia and Russian Federation — have formally associated themselves with the Guidelines; see also World Bank, Corporate Governance of State-owned Enterprises: A Toolkit (Washington D.C., 2014).

Enterprises, for instance, consider corporate governance important for the implementation of responsible business conduct principles and standards. The recommendations on disclosure and transparency are very similar in both guidelines and explicitly aligned in relation to stakeholder relations. The OECD Guidelines on Corporate Governance of State-Owned Enterprises provide that: "State ownership policy should fully recognize SOEs' (State-owned enterprises) responsibilities towards stakeholders .... It should make clear any expectations the State has in respect of responsible business conduct by SOEs. ... SOEs should observe high standards of responsible business conduct" (chap. V).

41. From an operational perspective, the corporate governance framework offers a useful anchor for implementing human rights requirements and is often already available at the national level. Corporate governance involves a set of relationships between a company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.[26] Several States are using the mechanisms set up for corporate governance to spell out and implement their expectations that State-owned enterprises respect human rights (see section III below).

42. The OECD Guidelines on Corporate Governance of State-Owned Enterprises also help to clarify the role and responsibilities of the State as owner. Active ownership is at the core of these guidelines. The guidelines constitute the "internationally agreed standard for how governments should exercise the State ownership function to avoid the pitfalls of both passive ownership and excessive State intervention" (p. 3). States are expected to act as "an informed and active owner, ensuring that the governance of SOEs is carried out in a transparent and accountable manner, with a high degree of professionalism and effectiveness" (chap. II).

43. Such aims are fully compatible with and necessary for the respect of human rights.[27] There is thus no tension between respecting the autonomy of the enterprise's management, on the one hand, and ensuring that State-owned enterprises respect human rights and responsible business conduct standards, on the other. In the same vein, the Working Group notes that setting up regulations to ensure that State-owned enterprises observe responsible business conduct and respect human rights is no obstacle to their achievement of economic targets. Better business conduct, including respect for human rights, leads to sustainable value creation,[28] while the contrary leads to reputational and material risks and costs.[29]

44. Therefore, the Working Group encourages States to build on the corporate governance framework to ensure their enterprises respect human rights. This does not mean that a State cannot choose other mechanisms and tools to do so. However, given the conceptual and practical proximity between the Guiding Principles on Business and Human Rights and the Guidelines for Multinational Enterprises, on the one hand, and the Guidelines on Corporate Governance of State-Owned Enterprises and the Principles of

[26] See OECD, *G20 OECD Principles of Corporate Governance*, p. 9.

[27] See report of Human Rights Council Advisory Committee on the issue of the negative impact of corruption on the enjoyment of human rights, A/HRC/28/73.

[28] OECD *Policy Framework for Investment 2015 Edition* (Paris,2015), chap. 7; and John Evans and Dinusha Peiris, "The relationship between environmental social governance factors and stock returns", Australian School of Business Research Paper No. 2010ACTL02.

[29] See for example, Rachel Davis, Daniel Franks, "The costs of conflict with local communities in the extractive industry", paper presented at the *First Seminar on Social Responsibility in Mining*, (Santiago, 19-20 October 2011); and Goldman Sachs Global Investment Research, "Top 190 projects to change the world" (April 2008), cited in A/HRC/14/27.

Corporate Governance, on the other, States may find it easier to implement them in a mutually reinforcing manner. The following section offers suggestions in this regard.

III. Leading by example: operationalizing the requirement to take additional steps

45. Guiding principle 4 recommends that States take additional steps to ensure that State-owned enterprises respect human rights, but it does not spell out what those steps should be. In this section, the Working Group suggests a range of measures that States, as owners of companies, could take to operationalize their obligations under principle 4. These suggestions do not exhaustively reflect national practices...Rather, they are based on selected practices, in particular those of States that responded to the Working Group's questionnaire, and on relevant international guidelines on State-owned enterprises, corporate governance and human rights.[30]

A. Setting expectations

46. Guiding principle 2 provides that States should set out clearly the expectation that all business enterprises (including State-owned ones) domiciled in their territory and/or jurisdiction respect human rights throughout their operations. A similar recommendation can be found in the OECD Guidelines on Corporate Governance of State-Owned Enterprises, which provide that the State has a responsibility to communicate to State-owned enterprises its expectations with regard to their financial and non-financial performance. With respect to responsible business conduct, it is expected that "SOEs should observe high standards of responsible business conduct" (p. 25).

47. Several States have issued corporate social responsibility guidelines to their enterprises, with no mention of human rights. This is the case of India (Guidelines on Corporate Social Responsibility and Sustainability for Central Public Sector Enterprises[31]) and China (Guidelines to the State-owned Enterprises Directly under the Central Government on Fulfilling Corporate Social Responsibilities[32]). Only a minority of States today have set specific human rights expectations of State-owned enterprises. This is not surprising as many States have yet to adopt policies explicitly requiring businesses in general to respect human rights.

48. States that have set expectations regarding respect for human rights by State-owned enterprises generally refer to the Guiding Principles on Business and Human Rights.[33]

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[30] Additional criteria for information were: existence of a National Action Plan (NAP) on business and human rights; countries which the Working Group officially visited; and relevant country practices showcased at Annual Forums on business and human rights. Unless specified otherwise, all national policies and practices cited in this section are derived from States' answers to the Working Group questionnaire, available at www.ohchr.org/EN/Issues/Business/Pages/ImplementationGP.aspx. All National Action Plans cited are also available at www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

[31] Available at www.dpemou.nic.in/MOUFiles/Revised_CSR_Guidelines.pdf.

[32] These were developed by the State-owned Assets Supervision and Administration Commission of the State Council (SASAC). See www.en.sasac.gov.cn/n1408035/c1477196/content.html.

[33] See, for example, the Danish National Action Plan – implementation of the UN Guiding Principles on Business and Human Rights (2014); and the Chilean Principles of Corporate Governance of Public

49. Some States specify particular areas of implementation, for instance requiring State-owned enterprises to take action to prevent abuse of human rights abroad and through their business relationships. This is in line with the commentary to guiding principle 2, which states that "there are strong policy reasons for home States to set out clearly the expectation that businesses respect human rights abroad, especially where the State is involved in or supports those businesses." Norway's White Paper on "Diverse and value-creating ownership" requires Norwegian companies to be familiar with the Guiding Principles and to "respect universal human rights as they are defined in international conventions, in all their undertakings, and in their dealings with suppliers and business partners." The Finnish National Action Plan on Business and Human Rights states that, "in State ownership steering, companies are required to observe human rights responsibly and transparently both in their own organizations and in subcontractor chains, in full accordance with the Guiding Principles." Ghana requires "business enterprises controlled by the State ... to comply with provisions for human rights due diligence relating to their activities in other jurisdictions where they operate."

50. State expectations can be focused on specific areas of human rights to which the State wishes to give greater impetus. For instance, Portugal requires State-owned enterprises to adopt gender equality plans.[34]

51. More importantly, several States require their enterprises to act as role models for sustainability and human rights. Sweden's Ownership Policy states that "State-owned enterprises shall act as role models with regard to sustainable business," which encompasses the requirement to comply with relevant guidelines, including the Guiding Principles and the OECD Guidelines for Multinational Enterprises. In Norway, State-owned enterprises are expected to work systematically on their corporate social responsibility and be exemplary in their respective fields. The definition of corporate social responsibility includes human rights and makes explicit reference to the Guiding Principles. Switzerland recognizes that it is the special responsibility of the State to safeguard human rights through State-owned enterprises and notes in particular that "federal enterprises are required to play an exemplary role". Although France does not distinguish between the human rights obligations of private and State-owned enterprises, it expects State-owned enterprises to "set an example".

52. **All the above examples are consistent with the strong policy rationale of guiding principle 4 that States should lead by example. Therefore, a logical additional step that States could take would be to require State-owned enterprises to lead by example in relation to human rights.**

53. A key reason for setting high expectations is linked to the ultimate rationale for State ownership, namely that "the State exercises the ownership of SOEs in the interest of the general public".[35] For the Swedish Government, State-owned enterprises are owned collectively by the Swedish people and are therefore important assets for the entire country. Governing State-owned companies is a task that imposes considerable responsibility, which must be performed in an active and professional manner with value creation as an overarching objective.

54. A further driver for States is managing reputational risk, especially when State-owned enterprises are globalized companies involved in complex value chains and

Companies (p. 25), which apply to the 22 State-owned companies under the Chilean Public Companies System.

[34] Portugal, Council of Ministers resolution 49/2007.

[35] See OECD, *Guidelines on Corporate Governance of State-Owned Enterprises*, p. 19.

operating in high-risk contexts. For China, fulfilling corporate social responsibility is important so as "to spread an image as a responsible nation".[36]

B. Mechanisms to set and manage expectations: ownership arrangements

55. The OECD Guidelines on Corporate Governance of State-Owned Enterprises emphasize that expectations established by the Government with regard to responsible business conduct should be publicly disclosed and mechanisms for their implementation be clearly established (p. 25). Practices in this regard vary. States can set human rights expectations for State-owned enterprises in different documents, such as national action plans on business and human rights or on responsible business conduct, or a State ownership policy. When it comes to ensuring that expectations set are implemented, models for exercising ownership offer a particularly useful avenue as they include functions and tools for implementing the State's requirements of State-owned enterprises.

56. According to international guidelines and good practices, shareholders should not interfere with the management and daily operations of enterprises in which they have holdings. The same applies to States in the exercise of ownership of State-owned enterprises. The OECD Guidelines on Corporate Governance of State-Owned Enterprises provide that "the Government should allow SOEs full operational autonomy to achieve their defined objectives and refrain from intervening in SOE management" (p. 34). Norway's Ownership Policy states that "companies in which the State has a holding are ... subject to regulatory and supervisory authorities in the same way as companies in which the State has no holdings". The same practice can be found in the Swedish Ownership Policy. These safeguards are in place to prevent the instrumentalization of State-owned enterprises for political or private gain and ensure a level playing field with private companies.

57. There are various models for managing ownership.[37] Ownership arrangements have evolved towards greater centralization, which is seen as a guarantee for effectiveness and ensuring clear distinctions between the roles of the State. Centralized arrangements delegate ownership functions to one designated entity — the ownership entity —, as is the case in Finland, France, Mozambique or South Africa. Some countries, such as Chile, Norway and Sweden, share ownership functions between one main ownership entity and other ministries, which are often in charge of specific sectors, while other countries, such as Bhutan and Malaysia, centralize ownership through a company-type structure.

58. **Regardless of the model chosen, all government entities and departments in charge of exercising ownership rights for either all or some State-owned enterprises should take the steps necessary to ensure that they respect human rights.**

59. While this is not yet the case in most countries, there are, nonetheless, practices to learn from. As examples in this section show, several States, such as Chile, Finland, Norway and Sweden, unequivocally use their ownership model to ensure that State-owned enterprises respect human rights, by explicitly stating their expectations in ownership policies or principles and the tasks that the ownership entity will commit to in order to ensure respect for human rights.

[36] See SASAC Guidelines, guideline I(4) (see para. 47 above).

[37] All examples are from The World Bank Toolkit and answers to the questionnaire.

C. Relationship between the State and company boards

60. In the light of the importance of preventing interference by the State in the management of enterprises, boards of directors constitute key vehicles for States, in their role as owners, to manage their relationship with State-owned enterprises. Relations with the board are also used to express State expectations that human rights be included in the enterprise's strategy and objectives.

61. In the Working Group's view, **it is important to establish explicit mandates for boards to ensure and monitor the implementation by State-owned enterprises of human rights standards and to account for it.** Norway's National Action Plan on Business and Human Rights states that "greater involvement by company boards [in human rights] will improve risk management and thereby help to maintain shareholder value." States could formally establish a code of conduct or principles on corporate governance for State-owned enterprises, as has been done in Chile, Norway and Switzerland. States can also apply a common code of conduct for both private and state-owned enterprises.[38] All of these codes or principles follow a "comply-or-explain" approach, which means that boards are expected to account for any deviation from the State's expectations, which in some cases may be justifiable.

62. Supervisory and support mechanisms to boards can be set up, which, in addition to monitoring compliance with State expectations, introduce expert knowledge on issues relevant to responsible business conduct or human rights. In Sweden, an investment team is envisaged for each State-owned company, which includes specialists in sustainable business. Each team analyses the operations, markets and sustainable business practices of the State-owned enterprises. Various aspects of ownership are addressed, including strategic objectives, board changes and target fulfilment.

63. Board nomination and evaluation is a useful mechanism for introducing State expectations into the board agenda and ensuring that expectations are embedded in the strategy of the enterprise. Board members can be evaluated in relation to the enterprise's overall performance with respect to responsible business conduct and human rights. This is done in Chile, Norway and Sweden.

64. Finally, States should ensure gender equality in the recruitment and membership of the boards of State-owned enterprises — a measure called for in the OECD Guidelines on Corporate Governance of State-Owned Enterprises and by United Nations human rights treaty bodies.[39] In its resolution on State ownership policy, the Finnish Government provides that "the State, in its capacity as owner, complies with the Gender Equality Act when making appointments to boards of directors". With regard to enterprises that are fully majority owned by the State, it requires that steps be taken to ensure that both women and men have equal opportunities for advancement and appointment to managerial posts, including senior management, management teams and other executive positions.[40]

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[38] This is the case in Sweden (see the Swedish Code of Corporate Governance) and in South Africa (see King Report on Governance for South Africa, and King Code of Governance Principles (King III), 2009.

[39] See *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, chap. III.E.2; CEDAW/C/POL/CO/7-8; CEDAW/C/FIN/CO/6.

[40] Finnish Government resolution on State Ownership Policy (2011), p. 9.

D. Oversight and follow-up mechanisms

65. Guiding principle 4 provides that States must ensure that relevant regulations regarding respect for human rights are implemented by State-owned enterprises and that they exercise their authority for scrutiny and oversight accordingly. The Council of Europe Committee of Ministers recommends that States should evaluate measures taken and respond to any deficiencies as necessary, including by providing adequate consequences.[41]

66. States can exercise effective oversight in various ways. A first step is to define clear and achievable targets to measure an enterprise's performance. Some States set sustainability targets for their enterprises, alongside financial and public policy targets (when applicable), while others expect the enterprises to set such targets themselves. In Switzerland, the Federal Council issues strategic goals every four years for all State-owned enterprises, which stipulate the expectation of "a corporate strategy committed to sustainable and ethical principles." In Chile, a set of targets and indicators involving financial, management and sustainability elements are defined. For Sweden, the financial targets and public policy targets (set by the State) and the monitoring of the strategic sustainability targets (set by the State-owned enterprise) are said to be important tools efor the State to communicate its expectations as owner. All sustainability targets, including human rights targets, that are formulated by the company are monitored in the same manner and through the same mechanisms.[42]

67. **Hence a useful additional step would be for States to set up — or, at a minimum, require that State-owned enterprises adopt — explicit human rights targets, and monitor their achievement in the same manner and with the same mechanisms used for sustainability targets.**

68. It is important that targets be balanced with regard to the different purposes of State-owned enterprises and their overall aim to maximize value to society, including respect for human rights. Ownership policies in Sweden and Norway contain guidelines on how to manage the balance between commercial targets, public policy assignment targets, when applicable, and long-term sustainability targets. In Sweden, the investment teams for company holdings, which are comprised of specialists in the area of sustainable business, monitor the sustainability targets of the companies and work on sustainable business. The evaluation is then integrated into the development of new financial targets and the overall evaluation of the companies.

69. States can also set up regular dialogues, or ownership meetings, with the boards of State-owned enterprises to track and assess compliance with targets, including human rights-related targets. This can be done at the annual general meeting if the State-owned enterprise operates as a company. Some States, such as Norway, hold additional meetings dedicated to discussing corporate social responsibility.

70. States could also use assessment tools with more detailed human rights-related criteria. For instance, in Sweden, a business analysis tool that includes human rights criteria has been developed for State-owned enterprises. It serves to increase the owner's awareness of companies' risks and opportunities and how they can be managed. The result of the analysis is taken into account in the ownership dialogue, in monitoring the company's development and in the recruitment and nomination of board members. Chile has a similar

[41] See recommendation CM/Rec(2016)3, para. 22.

[42] Communication with Swedish Ministry of Economy and Innovation in follow-up to Sweden's answer to questionnaire.

tool that evaluates performance in relation to key indicators related to corporate social responsibility, including impact and risk assessments of sustainability issues.

71. The State could also use independent review and audit mechanisms to review corporate social responsibility or human rights performance. In Sweden and Chile, the State appoints auditors to review the fulfilment of corporate social responsibility goals by the board and the chief executive officer of the company.

E. Capacity-building

72. Capacity-building can play an important role in helping State-owned enterprises fulfil State requirements on human rights. States should promote awareness-raising and training for members of the boards and management of companies on relevant international standards. States should also promote the sharing of experience among companies on best practices and challenges with regard to human rights. For instance, in its National Action Plan on Business and Human Rights, the Swedish Government commits to increasing knowledge about the Guiding Principles, due diligence and redress mechanisms in State-owned enterprises through a series of workshops.

73. States should encourage the participation of State-owned enterprises in relevant multi-stakeholder and multilateral initiatives related to responsible business conduct and human rights. In Brazil for instance, 25 State-owned enterprises are taking part in a business and human rights initiative launched by the National Secretariat for the Promotion and Defence of Human Rights. At the global level, just under 250 State-owned enterprises are members of the United Nations Global Compact.[41] Given the number of State-owned enterprises that are active in the extractive and energy sectors, they should be encouraged to join the Voluntary Principles on Security and Human Rights.[42]

F. Requirements of human rights due diligence

74. According to guiding principle 4, States should, "where appropriate", require that State-owned enterprises conduct human rights due diligence. State-owned enterprises are also subject to the corporate responsibility to respect (pillar II of the Guiding Principles), which includes conducting due diligence.

75. The requirement for State-owned enterprises to implement a full due diligence cycle is not yet common practice. However, several States require State-owned enterprises to conduct human rights due diligence in line with the Guiding Principles in a general manner.[43] The sector-specific Chinese Due Diligence Guidelines for Responsible Mineral Supply Chains require enterprises to "observe the Guiding Principles on Business and Human Rights during the entire life-cycle of the mining project", including operations abroad.[44]

[41] Available at www.unglobalcompact.org.

[42] Only two State-owned enterprises are currently participating. Available at www.voluntaryprinciples.org.

[43] See for example, the Chilean Principles on Corporate Governance, the Danish National Action Plan and the Norwegian Ownership Policy.

[44] See China Chamber of Commerce of Metals, Minerals and Chemical Importers and Exporters, "Due Diligence Guidelines for Responsible Mineral Supply Chains", p. 8. While the Chamber is a business association, it includes a large number of State-owned enterprises. The Guidelines were developed

76. The Swedish National Action Plan on Business and Human Rights provides that the State will ensure that State-owned companies, where appropriate, conduct human rights due diligence in order to assess and address any significant risk to human rights.

77. **In cases where due diligence is not mandatory for all State-owned enterprises and under all circumstances, the Working Group suggests that States define the criteria under which they will require State-owned enterprises to conduct human rights due diligence, such as the size of the enterprise, the type of enterprise and its operations, the political and human rights context and the industry sector in which it operates.**

G. Requirements of disclosure, transparency and reporting

78. Guiding principle 21 emphasizes the importance for businesses to communicate externally to account for how they address their human rights impacts. Similarly, the OECD Guidelines on Corporate Governance of State-Owned Enterprises recommend that "SOEs should report material financial and non-financial information on the enterprise in line with corporate disclosure standards, and including areas of significant concern for the state as an owner and the general public" (see sect. VI).

79. The corporate reporting trend is for increased requirements for report on non-financial information and performance, including human rights. The trend seems clearer with respect to large and State-owned companies.[47] States can, and already do, require State-owned enterprises to report annually to their owners, including on how they have achieved the objectives related to sustainability and human rights. Data from the Global Reporting Initiative shows that, in 2013, 13 out of 45 countries[48] had policies or initiatives for reporting on non-financial information, including on issues related to human rights, that specifically targeted State-owned enterprises.[49] In China, half of the over 1,600 sustainability reports published in 2012 were issued by large State-owned enterprises and listed companies.[50]

80. **Given those trends and the fact that transparency and accountability are prominent principles within most international guidelines,[51] the Working Group recommends that States take the additional step to systematically require the enterprises that they own or control to report on environmental, social and human rights performance.**

81. States could also suggest or require that companies follow an established methodology to communicate on human rights issues, such as the Global Reporting Initiative G4 Sustainability Reporting Guidelines, which include references to the Guiding

with OECD guidance. Available at www.mneguidelines.oecd.org/chinese-due-diligence-guidelines-for-responsible-mineral-supply-chains.htm.

[47] Global Reporting Initiative, *Carrots and Sticks: Sustainability reporting policies worldwide - today's best practice, tomorrow's trends* (2013); see also EU Directive 2014/95/EU regarding disclosure of non-financial and diversity information by certain large "public-interest entities" with over 500 employees.

[48] These were: Brazil, China, Ecuador, Finland, France, Iceland, India, Indonesia, Netherlands, Russian Federation, South Africa, Spain and Sweden.

[49] Global Reporting Initiative, *Carrots and Sticks*, p. 17.

[50] Ibid., p. 27.

[51] KPMG, *Currents of change: The KPMG Survey of Corporate Responsibility Reporting 2015*.

Principles and the Guiding Principles Reporting Framework.[52] State-owned enterprises in Chile, Norway and Sweden, for instance, are asked to report according to the Global Reporting Initiative guidelines.

82. Finally, aggregate reporting by the State on the activities and performance of the enterprises it owns is an additional means of improving companies' transparency. It is also a way to increase the State's transparency and accountability with regard to the requirements it sets for State-owned enterprises. In Norway and Sweden, the respective ownership entities publish an annual report on the State's ownership, which reviews the corporate social responsibility performance of all enterprises.

H. Ensure effective remedy

83. As part of their duty to protect, States must take all appropriate steps to ensure that victims of human rights abuses have access to effective remedy (pillar III of the Guiding Principles). This applies to abuses by State-owned enterprises and private companies equally. Given the separation of powers between the judiciary and the executive branch — more specifically, in this case, the department or entity exercising ownership rights — the State duty to ensure access to effective remedy for abuses by State-owned enterprises is not distinct to its duty to ensure remedy for abuses involving private companies. The ownership entity must respect the independence of judicial and non-judicial grievance mechanisms and not interfere in their proceedings. This limits the State's scope for action as an owner and might explain the lack of State policies and practices in this regard.

84. **As the owner of State-owned enterprises, the State should make sure that: (a) the enterprises it owns or controls do not obstruct justice; (b) they cooperate fully with judicial and non-judicial grievance mechanisms; and (c) they fully comply with their responsibility to respect human rights, including providing remediation for human rights abuses that they may be causing or contributing to.** These considerations are relevant for all three main categories of remedy mechanisms covered by pillar III of the Guiding Principles.

85. The first category is State-based judicial mechanisms. States must ensure access to judicial remedies for victims of all abuses, whether committed by a State-owned enterprise or a private company. In addition, as the owner of State-owned enterprises, the State needs to set clear expectations that: (a) when there are legal proceedings against a State-owned enterprise, the enterprise should not interfere in the judicial proceedings or use its special relationship with the State to interfere in or block proceedings; (b) States and State-owned enterprises should carefully consider the circumstances under which the enterprise might claim immunity based on its association with a State. Claims of State immunity in human rights cases often constitute a risk of being a barrier in access to remedy. The expectations of the State as owner of State-owned enterprises should be that the scope for claiming immunity should be limited to the bare minimum and that State-owned enterprises fully cooperate in judicial proceedings.[53]

[52] See the United Nations Guiding Principles Reporting Framework (2015), available at www.shiftproject.org/project-human-rights-reporting-and-assurance-frameworks-initiative-rafi. The reporting framework enables companies to report in-depth on their responsibility to respect human rights.

[53] See United Nations Convention on Jurisdictional Immunities of States and Their Property; see also the Explanatory Memorandum to Council of Europe Committee of Ministers recommendation CM/Rec(2016)3, para. 61.

86. The second category is State-based non-judicial mechanisms. Nothing prevents a State from setting up a dedicated accountability mechanism to address abuses by State-owned enterprises. For now, States seem to rely on existing mechanisms that address abuses by any company, whether private or State-owned. One such mechanism is the National Contact Points for the OECD Guidelines for Multinational Enterprises, which is established by each adhering Government. States should require State-owned enterprises to fully cooperate with National Contact Points and other non-judicial mechanisms, to participate in the processes in good faith and to accept the findings of the mechanisms. For instance, several State-owned enterprises in Brazil have signed terms of commitment to better uphold responsible business conduct and follow the OECD Guidelines for Multinational Enterprises, which include collaboration and dialogue with the National Contact Points regarding any allegation of non-observance of the guidelines.[54] States should also make it clear that State-owned enterprises should not claim a privileged position with regard to legitimate State-based mechanisms. In a landmark case, Norway's National Contact Point regretted the lack of cooperation by Norges Bank Investment Management, which manages Norway's Pension Fund, and stated that it was "particularly regrettable in light of the Norwegian people's expectation that applies to State-owned enterprises."[55]

87. The third category of remedy mechanisms is non-State-based grievance mechanisms, including operational-level grievance mechanisms. As with other aspects of their operations, and in order to fully abide by their responsibility to respect human rights, State-owned enterprises should be encouraged to be role models in their approach to remediation. States should require State-owned enterprises to establish or participate fully in operational-level grievance mechanisms (see guiding principle 29). The mechanisms must comply with the effectiveness criteria contained in guiding principle 31.

IV. Conclusions and recommendations

A. Conclusions

88. **All business enterprises, whether they are State-owned or fully private, have the responsibility to respect human rights. This responsibility is distinct but complementary to the State duty to protect against human rights abuses by business enterprises. This duty requires States to take additional steps to protect against abuses by the enterprises they own or control. This goes to the core of how the State should behave as an owner and the ways in which its ownership model is consistent with its international human rights obligations.**

89. **State-owned enterprises are an enduring and significant feature of the global economy. They can have major human rights impacts that are not always positive. Against this backdrop, there are compelling normative and policy arguments for States to take additional steps to ensure that State-owned enterprises respect human rights. Under some circumstances, an abuse of human rights by such enterprises may entail a violation of the State's own international law obligations and it is a matter of policy coherence for States to ensure that enterprises that are closely related to them**

[54] OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises 2014*, p. 25, available at www.mneguidelines.oecd.org/2014-annual-report-oecd-guidelines-for-mnes.htm.

[55] Norway National Contact Point for the OECD MNE Guidelines, "Final statement: complaint from Lok Shakti Abhiyan, Korean Transnational Corporations Watch, Fair Green and Global Alliance and Forum for environment and development vs. POSCO (South Korea), ABP/APG (Netherlands) and NBIM (Norway)", 27 May 2013, p. 8.

and over which they have greater control respect human rights. There are also compelling financial and reputational reasons for States, as active owners of companies, to do so.

90. While the call to take additional steps applies to all States equally, its precise implications will be context- and company-specific. In some countries or situations, or with respect to specific enterprises, the relationship between a State-owned enterprise and the State will be a very close one and the means at the disposal of the State to ensure respect for human rights and the level of its control and leverage over the enterprise will be greater than for others. In all those circumstances, States should take the utmost care to ensure that those enterprises respect human rights.

91. This does not mean that States should pay less attention to ensuring respect for human rights by fully private enterprises. The ultimate goal is the full respect for human rights by all enterprises, irrespective of size, sector, operational context, structure or ownership. As States work towards that goal, there are still persuasive reasons for them to lead by example. This will only strengthen their legitimacy in setting regulations and expectations towards private businesses.

92. The Working Group notes the significant efforts made by a number of States in all regions of the world to flesh out their duties to ensure that the enterprises they own or control respect human rights or standards of responsible business conduct. It notes also the effective models that a few States have developed. Yet, most States do not seem to fully understand what taking additional steps to protect against human rights abuse by State-owned enterprises means in practice. Nor does it seem obvious to many State-owned enterprises that they have a responsibility to respect human rights.

93. While this is no excuse for inaction, the Working Group acknowledges that, compared to that given to other business and human rights issues, less attention has been paid by all stakeholders to the human rights impacts of State-owned enterprises. This report has shown why this situation must change.

94. States, as primary duty bearers under international human rights law, should lead by example. To show leadership on business and human rights requires action and dedicated commitment on many fronts. It also includes using all the means at the disposal of States to ensure that the enterprises under their ownership or control fully respect human rights throughout their operations. There is untapped potential for State-owned enterprises to be champions of responsible business conduct, including respect of human rights. The Working Group calls on States and State-owned enterprises to demonstrate leadership in this field.

B. Recommendations

95. In the present report, the Working Group suggested a preliminary framework for analysis and action and elaborated on the measures States should take as owners of companies. These issues are complex and will have context-specific implications. The Working Group welcomes feedback from States and other stakeholders on the report and on the following recommendations:

Recommendations to States

96. States should comprehensively review whether and to what extent they are meeting their international human rights obligations through the business activities of the enterprises that they own or control, at home and abroad.

97. Based on that review, States should identify key entry points and measures to be taken to more effectively discharge their obligations under principle 4 of the Guiding Principles on Business and Human Rights, taking into account the measures suggested in Section III of this report. States should specify the precise tasks they commit to do in this respect in a public document, such as a National Action Plan.

98. At a minimum, States should clearly set their expectations that State-owned enterprises respect human rights throughout their operations, adopt human rights commitments and be role models in this regard. States could set out their expectations in a specific document such as a national action plan or, preferably, amend existing regulations on ownership, corporate governance or responsible business conduct so as to expand their coverage.

99. States should be coherent in their implementation of international standards and not implement them selectively. More specifically, the OECD Guidelines on Corporate Governance of State-owned Enterprises should be implemented in a mutually reinforcing manner with the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises.

100. States should, as a matter of policy coherence and accountability, ensure that the scope of any future legally binding instrument on or relevant to business and human rights covers enterprises that are owned or controlled by the State.

Recommendations to State-owned enterprises

101. State-owned enterprises should strive to be role models and fully meet their responsibility to respect human rights.

102. To do so, they should adopt appropriate policies and processes to address abuse, including a policy commitment, human rights due diligence and remediation mechanisms when harm occurs, which are integrated throughout their operations.

Recommendations to national human rights institutions

103. National human rights institutions should assess whether relevant policies relating to State-owned enterprises are aligned with the State's human rights obligations and provide guidance to the State in this regard.

104. They should provide guidance to State-owned enterprises on their human rights responsibilities.

Recommendations to international organizations and the United Nations system

105. International organizations and the United Nations system should assist States and promote coherence in their implementation of international guidelines on corporate governance, responsible business conduct and human rights.

106. They should promote such coherence when supporting States in developing national plans to meet the Sustainable Development Goals, especially given the potentially significant role that State-owned enterprises will play in this regard.

107. They should support initiatives to contribute to building the knowledge base and competency of boards of directors and management of State-owned enterprises with regard to respect for human rights.

Recommendations to the United Nations human rights system

108. United Nations human rights treaty bodies and special procedures, in examining individual communications under their complaint procedures, assessing

specific countries and drafting general comments and recommendations, should examine the human rights impacts of enterprises that are owned or controlled by a State and clarify the State's duty with respect to these enterprises, taking into account principle 4 of the Guiding Principles on Business and Human Rights.

Recommendations to civil society organizations and academia

109. Civil society and academia should dedicate increased attention to the implications of State duties with respect to State-owned enterprises and the responsibility of State-owned enterprises to respect human rights, including in terms of access to remedy and accountability under national and international law;

110. They should gather data specific to State-owned enterprises and their human rights commitments and performance, in order to identify gaps and good practices globally.

Recommendations to business associations

111. Business and employer associations, particularly in countries or sectors with many State-owned enterprises, should build their own capacity around business and human rights and offer specific guidance to their members that are State-owned enterprises on their responsibility to respect human rights.

112. Business associations should use their convening power to share learning and good practices among State-owned enterprises.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its visit to Brazil from 7 to 16 December 2015.

* The document was submitted late to the conference services without the explanation required under paragraph 8 of General Assembly resolution 53/208 B.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on its mission to Brazil**

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** Circulated in the language of submission only.

I. Introduction

1. Further to Human Rights Council resolutions 17/4 and 26/22, two members of the Working Group on the issue of human rights and transnational corporations and other business enterprises, Pavel Sulyandziga and Dante Pesce, visited Brazil from 7 to 16 December 2015, at the invitation of the Government. The purpose of the visit was to assess the efforts made to prevent and address adverse human rights impacts of business-related activities, in line with the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework. It was the Working Group's first visit to a country in the Latin America and Caribbean region.[2]

2. During their visit, the experts met with government officials from the Office of the Presidency of the Republic, the Ministry of Women, Racial Equality and Human Rights (Secretariat for Human Rights), the Ministry of External Relations, the Ministry of Labour and Employment, the Ministry of Finance, the Ministry of Justice, the Ministry of Mines, the Ministry of the Environment, the Ministry of Consumer Protection, the Brazilian Institute of Environment and Renewable Natural Resources, the Brazilian National Indian Foundation, the Office of the Attorney General, the Ombudsman Service and the Office of the Comptroller General. They also met with prosecutors from the Federal Public Ministry, the Brazilian Development Bank (BNDES), the São Paulo Stock Exchange, officials and public prosecutors in the States of São Paulo, Rio de Janeiro, Minas Gerais and Pará, and with members of Congress (Chamber of Deputies), representatives of the Commission on Human Rights and Minorities (Chamber of Deputies), the Central Workers Union — the main trade union in Brazil —, the Industry Federation of the State of Rio de Janeiro, Ethos Institute, Global Compact Network Brazil, United Nations agencies and representatives of business enterprises (including Norte Energia, Petrobras, Samarco, Carrefour, BHP Billiton and Vale), civil society organizations and affected communities. They travelled to Brasília, São Paulo, Rio de Janeiro, Belo Horizonte, Mariana, Altamira and Belém.

3. The Working Group thanks the Government for its invitation and for its assistance before, during and after the visit; it appreciated its openness and willingness to engage in discussions. It also thanks the organizations, businesses, communities and individuals with whom it met and who facilitated site visits and meetings with stakeholders. It appreciated the constructive discussions on the progress made and challenges in the protection of human rights in the context of business activities.

4. In the present report, the Working Group outlines its findings and makes recommendations for action that may assist in addressing and remedying the challenges identified.

II. General context

5. Brazil is the largest country in the Latin America and Caribbean region, with a population of 206 million.[3] Brazil is a federal republic comprising 26 states, one Federal District (where the capital, Brasília, is located) and 5,507 municipalities.

6. The Brazilian economy is the world's seventh largest and the largest in Latin America. Brazil is a part of BRICS (Brazil, Russian Federation, India, China and South

[1] See A/HRC/17/31, annex.

[2] The Working Group has now visited States in all United Nations regional groups.

[3] See http://data.worldbank.org/country/brazil.

Africa), an association of five major emerging economies, as well as a member of the New Development Bank, a multilateral development bank operated by BRICS.

7. Brazil recently experienced a period of sustained economic growth. From 2003 to 2013, there was significant economic and social progress, during which, over 26 million people were lifted out of poverty. While household income inequality, measured by the Gini index, decreased from 53.1 per cent in the period 2001-2005 to 52.9 per cent in the period 2011-2015,[4] it still remains high. There are also large differences in social indicators between the richer southern and south-eastern regions and the northern and north-eastern regions.[5]

8. At the time of the visit, the country was going through difficult times. Apart from the economic recession, the Working Group's visit took place against the backdrop of a political crisis, corruption scandals involving major companies and the political establishment and a mining and environmental disaster resulting from the rupture of the Fundão tailings dam, which impacted the States of Minas Gerais and Espiritu Santo.

III. Legislative and policy framework

9. Brazil has signed and ratified, or acceded to, eight of the nine core international human rights treaties.[6] It has signed and, in some cases, ratified all the Optional Protocols, except for two.[7] Brazil has also ratified seven of the eight International Labour Organization (ILO) fundamental conventions that cover four categories of principles and rights, namely, the right to organize and bargain collectively; abolition of forced labour; abolition of child labour; and elimination of discrimination in employment and occupation.[8] It has ratified three of the four ILO governance conventions[9] and 86 of the 177 ILO technical conventions.

10. Power is exercised through the executive, legislative and judicial branches of Government. At the federal level, the executive is headed by the President. The bicameral National Congress, consisting of the Federal Senate and the Chamber of Deputies, exercises legislative power. State governments consist of three branches: the executive, represented by a governor and an appointed cabinet, the legislative, constituted by a unicameral congress, and a judiciary. States are divided into municipalities, which are governed by a mayor.

11. The 1988 Federal Constitution is the main political and legal instrument. It sets out the decentralized governance system: each of the 26 states is autonomous and has its own constitution and the Federal District, as well as each municipality, has its own organic law. State constitutions are subject to and must observe the Federal Constitution and its principles. The organic law of each municipality must observe the Federal Constitution and its principles and the relevant state constitution. The Federal Constitution gives paramount importance to fundamental freedoms and human rights, as well as to social rights and the

[4] See http://data.worldbank.org/indicator/SI.POV.GINI.

[5] See www.worldbank.org/en/country/brazil/overview.

[6] Brazil has not signed or ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

[7] Brazil has not signed or ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights nor the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

[8] Brazil has not ratified the International Labour Organization (ILO) Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

[9] Brazil has not ratified the ILO Labour Inspection (Agriculture) Convention, 1969 (No. 129).

rights of workers. For example, it provides for a nationally unified minimum wage, capable of satisfying the basic living needs of workers and their families (art. 7 (4)). The Federal Constitution also sets out the right to the enjoyment of an ecologically balanced environment (art. 225) and provides for an economic order that is intended to ensure everyone a life with dignity, according to the dictates of social justice (art. 170), while the "prevalence of human rights" is one of the principles governing Brazil's international relations (art. 4).

IV. Awareness of business and human rights

12. The Working Group found that, while some companies have specific policies and guidance on human rights in line with the Guiding Principles, it was clear that this was not the case for a majority of business enterprises in Brazil. When asked about pressing business and human rights issues, many interlocutors mentioned efforts to reduce child labour and slavery, or forced labour. While important, these do not comprise all the issues covered by the Guiding Principles. As such, raising awareness of the Guiding Principles and investing in capacity-building efforts should be priority action areas.

13. The Working Group noted that human rights risks were mainly seen as risks to a company's operations, rather than risks faced by vulnerable rights holders. Companies should not just be assessing human rights risk by analysing the risk to the company of the success or failure of projects. If companies focus on human rights risk only in relation to a specific project, then a holistic consideration of human rights risk may be sidelined to the detriment of affected communities. The Working Group recognizes that businesses may be less familiar with human rights than the Government and civil society and that there may be challenges in integrating human rights within corporate systems and decision-making processes. It will therefore be important that the Government provide guidance to companies about the actions they must take in line with the Guiding Principles.

14. The Working Group explored initiatives to promote responsible business practices, including: the Global Compact Network Brazil, which incorporates stakeholders from both business and civil society; the Pro-Equity Programme, which promotes equality in the workplace;[10] sustainability reporting requirements;[11] the sustainability index of the São Paulo Stock Exchange and voluntary corporate social responsibility disclosures;[12] a monthly multi-agency forum on corporate social responsibility; Federal Law 12846/2013, the anti-corruption law that holds companies strictly liable for corrupt acts by their employees, with fines of up to 20 per cent of gross revenue from the previous year, or suspension or dissolution of the company; a partnership between the Fundação Getulio Vargas research institute and the Ministry of Women, Racial Equality and Human Rights regarding a protocol for the protection of the rights of children and adolescents during the licensing and bidding processes for infrastructure projects; and the National Registry of Companies Committed to Ethics and Integrity, an initiative of the Office of the Comptroller

[10] See Programa Pró-Equidade de Gênero e Raça, available at www.spm.gov.br/assuntos/mulher-e-trabalho/programa-pro-equidade-de-genero-e-raca/6a-edicao/leia-mais.

[11] See the Group of Friends of Paragraph 47 initiative, formed by Brazil, Denmark, France and South Africa in recognition of paragraph 47 of the outcome document of the United Nations Conference on Sustainable Development, entitled "The future we want", to advance corporate sustainability reporting, available at www.unep.org/resourceefficiency/Portals/24147/Business-Ressource%20Efficency/Go/47%20Two-Pager.pdf.

[12] See www.bmfbovespa.com.br/en_us/products/indices/sustainability-indices/corporate-sustainability-index-ise-I.htm.

General and the Ethos Institute, which is aimed at giving visibility to companies investing in ethics, integrity and corruption prevention.[13]

15. The Cooperation and Facilitation Investment Agreements signed by Brazil in 2015 contain corporate social responsibility clauses calling on foreign investors to respect human rights and environmental laws in the host country. However, the Working Group noted criticism that the agreements do not require companies to conduct human rights impact assessments and were not subject to public consultation. The Government stated that civil society was consulted about the model of the Cooperation and Facilitation Investment Agreements. The Brazilian Development Bank (BNDES) — a main source of funding for large-scale development projects in Brazil and abroad, which provides support for exports, technological innovation, sustainable socio-environmental development and the modernization of public administration —, as an entity regulated by the Central Bank of Brazil, is required to have a social and environmental risk policy.[14] While the Brazilian Development Bank (BNDES) requires that the projects it funds adhere to environmental and social standards and claims that human rights issues are taken seriously, the Working Group expected to see a more explicit requirement that projects include safeguards against adverse human rights impacts in line with the Guiding Principles. The Working Group was informed that the Brazilian Development Bank (BNDES) does not disclose information regarding social and environmental impact assessments undertaken in respect of projects in Brazil and abroad as part of its transparency policy. The Working Group expected more transparency with regard to environmental, social and human rights impacts.

16. The Working Group was made aware of concerns regarding access to affordable generic medicines and the impact of patents in that regard. Attention was drawn to challenges to the continued need for the Brazilian Health Surveillance Agency[15] to be involved in the analysis of pharmaceutical patent applications at the "prior consent" stage and to the fact that, without the Agency's involvement, there was the risk of patent monopolies emerging, which would hinder access to medicines.[16]

17. Brazil has a number of State-owned enterprises. Those companies have the responsibility to avoid causing adverse human rights impacts under pillar 2 of the Guiding Principles, while under pillar 1, the State is also expected to take additional steps to ensure that State-owned enterprises respect human rights in their operations.[17] The Working Group was informed that the proposed law on State-owned company responsibility[18] would require such enterprises to prepare a sustainability report in accordance with the Global Reporting Initiative standards. A member of the Federal Senate and some civil society organizations

[13] *Cadastro Nacional de Empresas Comprometidas com a Ética e a Integridade* (*Cadastro Empresa Pró-Ética*), see www.opengovpartnership.org/country/commitment/implementation-pro-ethics-company-registry.

[14] On 28 April 2014, the Central Bank of Brazil enacted resolution No. 4327, which establishes guidelines for financial institutions and other organizations whose operations it authorizes in connection with the creation and implementation of social and environmental responsibility policies. See www.bndes.gov.br/SiteBNDES/bndes/bndes_en/Institucional/Social_and_Environmental_Responsibility/environmental_policy.html.

[15] *Agência Nacional de Vigilância Sanitária* (ANVISA).

[16] See Brazil, Industrial Property Law No. 9.279 of 1996, art. 229-C.

[17] Guiding Principle 4 clarifies that, as part of their duty to prevent and address adverse human rights impacts arising from business activities, States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

[18] See Senate bill No. 555 of 2015, available at www25.senado.leg.br/web/atividade/materias/-/materia/122838.

are reportedly advocating for the inclusion of stronger language, such as reference to the Guiding Principles, and key aspects of the corporate responsibility to respect human rights, such as having a human rights policy and a grievance mechanism and undertaking human rights due diligence.[19] In 2013, the Government facilitated a commitment[20] by State-owned enterprises to better comply with the Organization for Economic Cooperation and Development (OECD) Guidelines for Multinational Corporations, including the chapter on human rights, which is aligned with the Guiding Principles. In addition, the National Confederation of Industry participated in the first annual Global Employers' Summit, in Bahrain in 2015. The outcome document of the Summit, the Bahrain Declaration, calls for the implementation of the Guiding Principles.[21] Although all this is encouraging, increased awareness of the Guiding Principles and of business and human rights issues is needed in addition to accountability mechanisms to track progress in implementing commitments made.

V. Issues related to large-scale development projects

18. The Growth Acceleration Programme has promoted public and private investment in large-scale development projects. Many projects have had significant adverse human rights impacts on local communities, as documented by a special commission of the National Council on Human Rights, which studied seven large-scale development projects, including hydropower plants and mines, over a period of four years.[22]

19. The Working Group heard testimonies from affected communities about cases related to extractive industries, agribusiness and construction, including the Belo Sun gold mining project on the Xingu River in Pará; development projects in Sepetiba Bay, Rio de Janeiro, which reportedly caused industrial pollution, skin and lung disease and destroyed the local fishing economy; intimidation against activists seeking to prevent business-related human rights harm resulting from the Suape Port and industrial complex in Recife, Pernambuco; hydro-electric dams proposed for the Tapajos River in Pará; the Grande Carajás project in Pará, the largest open-pit iron ore mining complex in the world, which reportedly affects 100 communities and is responsible for the railway connecting the mine to the Ponta da Madeira port in Maranhão and which has reportedly brought deforestation, land conflict, pollution and violence to the area, to the detriment of the indigenous peoples; and the Açu logistics industrial port complex, located in São João da Barra, which reportedly affects the water supply and housing of the population in local mining towns. The cases illustrate recurrent concerns such as pollution, lack of consultation, inadequate government oversight, land expropriation, health impacts and destruction of communities.

20. Due to time constraints, it was not possible to study the cases in great depth, however, the Working Group looked closely at a few cases that illustrated the recurrent concerns raised.

[19] See www.senado.leg.br/atividade/rotinas/materia/getPDF.asp?t=177883&tp=1.

[20] Signed by the Organization for Economic Cooperation and Development (OECD) National Contact Point for Brazil, Banco do Brasil, Caixa Econômica Federal, Eletrobras and Itaipu. See OECD, *Annual Report on the OECD Guidelines for Multinational Enterprises* (2014), p. 25, available at www.oecd.org/daf/inv/mne/MNE-Annual-Report-2014-NCP-Activities.pdf.

[21] See www.employerssummit.com/Bahrain_Declaration_EN.pdf.

[22] See www.sdh.gov.br/sobre/participacao-social/cddph/relatorios/relatorio-c.e-atingidos-por-barragens.

A. Belo Monte

21. The Working Group visited Altamira and Belém in the State of Pará to look into the construction of the Belo Monte hydropower plant,[23] located along the Xingú River. The Belo Monte dam was due to become operational in March 2016 and provide energy for 60 million people in 17 states.[24] Located in an area comprising 11 indigenous lands and 2 indigenous areas (although the Government emphasized that the dam itself was not located on indigenous lands), Belo Monte is being constructed by Norte Energia, a consortium of 10 Brazilian public and private energy companies and investment funds. Its major shareholder is Eletrobras, a State-owned enterprise. Although construction had almost been completed, in 2015, both the Federal Public Ministry and the Brazilian National Indian Foundation advised against granting the operating licence as Norte Energia had not met the licence conditions to mitigate adverse social and environmental impacts. In response to human rights concerns and at the request of the Federal Public Ministry, an interministerial fact-finding mission was carried out in June 2015. It formulated 55 specific observations concerning the lack of implementation of mitigation measures to protect against adverse human rights impacts.[25] Despite this, the Brazilian Institute of Environment and Renewable Natural Resources granted the operational licence on 24 November 2015.

22. A court filing made on 7 December 2015 with the Federal Court in Altamira, Pará, by the Federal Public Ministry accused the Federal Government and Norte Energia of ethnocide owing to the destruction of indigenous society and culture during the construction of the dam.[26] The impacts of the Belo Monte dam were considered by the Inter-American Commission on Human Rights in April 2011, further to a request for precautionary measures on behalf of indigenous communities of the Xingu River Basin in Pará. The request was granted on the basis that the life and physical integrity of the communities were at risk owing to the impact of the construction of the Belo Monte dam.[27] The Commission requested Brazil to suspend the licensing process and cease construction work until certain conditions were met.[28] The Commission evaluated the precautionary measures in July 2011 and removed the request to suspend construction work, while requesting the State to adopt measures to protect the life and health of the indigenous communities affected by the Belo Monte project. The Commission opened a case against Brazil on 21 December 2015, to which Brazil is required to respond.

23. The Working Group met with officials of Norte Energia, affected communities, indigenous peoples and public prosecutors, in Altamira, and with state authorities in Belém to assess the measures taken to identify and prevent human rights risks and mitigate adverse human rights impacts. Norte Energia informed the Working Group of the socio-environmental actions undertaken in accordance with the licensing conditions, such as a programme to combat malaria and the construction of water, sewage and landfill facilities, health clinics, schools, a hospital in Altamira and a fish market. While these will likely be

[23] The world's third-largest hydroelectric power plant.

[24] See www.pac.gov.br/noticia/6906a06e.

[25] See www.prpa.mpf.mp.br/news/2015/arquivos/Relatorio_inspecao_ribeirinhos_Belo_Monte_junho_2015.pdf/.

[26] See www.prpa.mpf.mp.br/news/2015/arquivos/ACP_Belo_Monte_Componente_Indigena_2.pdf.

[27] The communities concerned are: the Arara of Volta Grande do Xingu; Juruna of Paquiçamba; Juruna of "Kilômetro 17"; Xikrin of Trincheira Bacajá; Asurini of Koatinemo; Kararaô and Kayapó of the Kararaô indigenous lands; Parakanã of Apyterewa; Araweté of the Igarapé Ipixuna; Arara of the Arara indigenous lands; Arara of Cachoeira Seca; and Xingu Basin indigenous communities in voluntary isolation.

[28] See Organization of American States, PM 382/10 (2011), available at www.oas.org/en/iachr/indigenous/protection/precautionary.asp#382-10.

of benefit to the local population. Norte Energia did not seem to have a human rights-based approach. The Working Group heard claims of a lack of engagement and consultation on the part of Norte Energia and a lack of recognition of its responsibility to exercise human rights due diligence and avoid causing human rights harm. State authorities in Belém said that a school built by Norte Energia was just a temporary container that was inadequate for the hot Altamira climate and it was now being used as a warehouse. Riverine people reported that they had been resettled in housing far from the river — their main source of livelihood — with no infrastructure. In both cases, there appeared to have been limited or no consultation with affected communities about effective mitigation measures. In a report on assessments forming part of the technical reports produced by the Brazilian Institute of Environment and Renewable Natural Resources, Instituto Socioambiental emphasized that the Brazilian Institute did not consider whether the homes built to rehouse displaced people were suitable for the local cultural conditions, only whether an adequate number of homes had been built. If true, this would be a weakness in the Brazilian Institute's oversight of compliance with environmental licensing conditions intended to mitigate the loss suffered by affected communities.[29]

24. Reportedly, there was little planning to prepare Altamira for the large influx of construction workers,[30] and the population growth resulting from the commencement of construction work was accompanied by cases of violence, trafficking, sexual exploitation of women and girls and alcohol abuse. The Secretariat of Human Rights highlighted the sexual exploitation of children in the context of displaced populations and the construction of hydroelectric dams.

25. The Working Group visited the Independente II neighbourhood, a poor residential area of 400 houses in Altamira, which is to be flooded when the dam reservoir is filled. Residents reported that Norte Energia had resisted resettling them and they had not received any information nor had they been consulted on their resettlement. Following advocacy by civil society organizations, the Brazilian Institute of Environment and Renewable Natural Resources included a new licensing condition in November 2015, which requires Norte Energia to provide alternative housing for the residents of Independente II before October 2016. Residents were worried this would not happen and they did not have information about relocation plans.

26. Testimonies pointed to a failure to fully consider the social and cultural contexts surrounding the Belo Monte project and to take seriously the duties owed to the members of the affected communities, in accordance with human rights standards. Those responsible for development projects have the duty to prevent disruption to the life of those living in local and indigenous communities and to ensure adequate protection for vulnerable groups. Given the involvement of State-owned enterprises in the project, the Federal Government would also be expected to use its leverage to ensure that effective human rights due diligence is implemented.

27. The Government informed the Working Group that human rights issues were included in environmental licensing rules relating to large development projects and cited, for example, resolution 1/1986 of the National Council on the Environment. It emphasized that, apart from the judiciary and federal prosecutors, many governmental bodies, including the Brazilian National Indian Foundation and the Fundação Cultural Palmares (responsible for people of African descent) participate in the licensing process associated with large

[29] See the technical note on compliance with environmental conditions of the Belo Monte plant (Altamira, 7 March 2013).

[30] Federal prosecutors said that the population of Altamira swelled from 70,000 to 300,000.

development projects. It maintained that local communities were consulted and informed about the Belo Monte project through public hearings.

B. Mining and the Doce River disaster

28. The Working Group met with state authorities, businesses, civil society and community representatives in Minas Gerais, the state with the highest concentration of mines. The Working Group's visit took place following the rupture, on 5 November 2015, of the Fundão tailings dam in the district of Mariana — referred to as the worst environmental disaster in Brazil. The tailings dam operated by the mining company Samarco Mineração SA[31] contained iron ore residue. The dam rupture resulted in the release of 55 million to 60 million cubic metres of mining residue into the Doce River, inundating villages with mud, destroying the towns of Bento Rodrigues and Paracatu de Baixo and causing the death of 18 people (with one person missing)[32] and affecting the lives of the 3.2 million people who live along the Doce River. The mud travelled more than 600 kilometres down river to the ocean, killing fish, fauna and flora, and causing a major social and environmental crisis that affected the livelihood and access to drinking water of the population, including the Krenak indigenous community and thousands of fishermen who depend on the river.

29. The Working Group met with executives of Samarco, Vale and BHP Billiton to discuss the actions taken since the disaster. It also met with people affected from Mariana, Minas Gerais and Espiritu Santo, and state and federal prosecutors involved in the case. Affected communities were concerned about receiving support to rebuild their lives and worried about the health and environmental risks posed by the contaminated river and ocean, and the lack of information in that regard. They did not trust the information provided by Samarco, including assurances that the tailings did not include toxic material and that the water was safe to drink following the installation of provisional water treatment facilities. They were also concerned that more dams could collapse. The Working Group noted that it had taken almost two weeks for Samarco to announce that two other structures[33] were unsafe and that there had been a failure in the company's contingency plan as people had not been alerted about the disaster, despite the 10-hour interval between the dam rupture and the flooding of Barra Longa. Prior warning would have allowed people to save belongings and might have saved lives.

30. While the Working Group considered it positive that it was the Chief Executive Officer who led the company's response and showed willingness to consult with the communities and to provide just compensation to those affected, it encouraged Samarco to pay close attention to critical voices and to be transparent and explain the failings in the early response to the disaster. The Working Group emphasized the need to restore trust by improving consultation and ensuring access to information and essential services. It also advised Samarco to create an environment where people, including its employees, could express concerns without fear of reprisal.

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[31] Owned in equal parts by Vale and BHP Billiton.

[32] The disaster prompted press releases and a communication from special procedure mechanisms. See for example, "Brazilian mine disaster: 'This is not the time for defensive posturing' — UN rights expert", at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16803&LangID=E; "Brazil mine disaster: UN human rights expert calls for urgent access to safe drinking water", at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16855&LangID=E; and BRA 10/2015 of 24/11/2015 in A/HRC/31/79, p. 157.

[33] The Santarém dam and the Selinha dike.

31. Given the scale of the disaster, the Working Group considered that the federal and state authorities could have done more in the aftermath. While the Office of the Presidency informed the Working Group about the relief efforts made, members of affected communities indicated a need for federal and state authorities to provide them with more information about the resettlement process and compensation. Although Samarco is responsible for repairing the damage caused, the Federal Government remains the primary duty bearer required to uphold the human rights of affected communities.

32. The Working Group notes that, in March 2016, Samarco agreed to settle a civil public claim brought by the Brazilian authorities on 30 November 2015,[34] and cautions the importance of thoroughly assessing the level of damages needed to engage in the lengthy remediation work required and to ensure adequate compensation to every affected person, on the basis of full consultation with everyone concerned, bearing in mind that no financial settlement can bring back lives lost or fully compensate for suffering endured.[35]

33. While the exact cause of the collapse of the Fundão dam is still unknown, such events should never occur. The incident underlines the importance of strict licensing rules, proper regulatory oversight and contingency plans. The Working Group is concerned that, with the large number of dams and mining sites in Minas Gerais, in particular, and the country, in general, there is limited capacity, at individual state and federal State levels, to conduct safety inspections in order to ensure that this tragedy will never be repeated.

C. Construction work for the 2016 Olympics

34. The 2014 World Cup and 2016 Olympic Games have led to a construction boom.

35. A human rights concern related to mega sporting events is the need to ensure adequate safeguards for people who are pressured to resettle in order to make way for construction projects. In 2011, the United Nations Special Rapporteur on the right to adequate housing highlighted cases of displacement and evictions in São Paulo, Rio de Janeiro and Belo Horizonte.[36] Similar concerns were raised and a recommendation — which was supported by Brazil — was made in the context of the universal periodic review in 2012.[37]

36. The Working Group visited Vila Autodromo, a neighbourhood of Rio de Janeiro close to the Olympic construction sites, where about 100 people, to whom the state government reportedly issued land titles, were refusing to leave their homes. Many other members of the community had accepted resettlement and compensation.

37. The Working Group was informed that, in June 2015, there was a violent clash with residents as municipal security forces (*Guarda Municipal*) sought to break a human chain that the community had formed around two homes which were going to be demolished. The Working Group heard testimonies from residents who had been part of the human chain

[34] See www.brasil.gov.br/meio-ambiente/2016/03/2018rio-doce-sera-melhor-que-antes-da-tragedia2019-diz-agu-ao-anunciar-acordo.

[35] The Working Group notes that the settlement does not relate to any reported criminal investigation under way, possible legal action in the affected states or reported personal and class action claims.

[36] See "Right to housing at risk as Brazil prepares for World Cup and Olympics – UN expert", at www.un.org/apps/news/story.asp?NewsID=38189#.VzLlv011Iu3.

[37] See A/HRC/21/11, para. 119.57: Ensure that urban restructuring in advance of the 2014 World Cup and the 2016 Olympics be properly regulated to prevent displacements and forced evictions, and that residents in affected areas are given full and timely information about proposals affecting them; engage in a genuine negotiation with the communities to explore alternatives to eviction; and, where necessary, offer compensation or alternative adequate housing close to the existing communities.

and saw photographs of the violent treatment that elderly residents were subjected to by the municipal security forces, resulting in bloodied faces and injuries. The community said that the Mayor had stated that people could stay in their homes and that no one would be forced to leave. However, as the Working Group witnessed, life for those who remained in Vila Autodromo was being made physically and psychologically unsafe. Residents were surrounded by construction sites and reported frequent cuts to the electricity and water supply. Destroyed buildings peppered the area and wide trenches of noxious-looking black liquid could be seen along the perimeter of the community.

38. The Working Group subsequently received information about the continuing difficulties faced by residents, including the demolition of homes without warning and the destruction of the community centre in which the Working Group had held meetings.

39. The Working Group also met with the Rio 2016 Committee Head of Sustainability, Accessibility and Legacy, who set out the steps taken in preparation for the Olympic Games, which included requiring suppliers to comply with the Ethical Trading Initiative and register with the Supplier Ethical Data Exchange (Sedex) to complete audits of supply chains and launching a child-protection campaign with 20 organizations, which included working with hotel chains and taxi drivers to prevent the sexual exploitation of children, and with Olympic venues regarding how to deal with lost children and alcohol consumption by children. The Working Group also learned how the Rio 2016 Sustainability Management Plan was designed with the engagement of federal, state and municipal governments and civil society organizations.[38] The Working Group referred to the situation it had observed at Vila Autódromo and, given that the construction around Vila Autodromo is taking place owing to the holding of the Olympics, it encouraged the Rio 2016 Organizing Committee to take an interest and put forward concerns about the situation in its discussions with the Mayor and other municipal authorities. The meeting also focused on how the Organizing Committee had leverage on human rights issues, especially during a bidding stage, and on the importance of incorporating human rights issues into mega sporting events contracts.

D. General observations

40. While Brazil has a well-developed legal framework and regulations and mechanisms to protect human rights against business-related harm, the Working Group considers that regulatory agencies such as the Brazilian Institute of Environment and Renewable Natural Resources and the Brazilian National Indian Foundation should be strengthened to ensure that they are able to act unhindered and independently as a check against adverse human rights impacts in the context of large-scale development projects. Rights holders who may be affected by development projects must be provided with sufficient support to enable them to be in a balanced negotiating position vis-à-vis a company. Effective stakeholder engagement, especially enabling the voice of the most vulnerable, is particularly important. The Working Group observed that, in some cases, without the support of civil society and public prosecutors, affected communities would be virtually powerless.

41. A common theme that was reported to the Working Group in relation to large-scale development projects was concern that measures to mitigate adverse human rights impacts were conceived and implemented without effective and meaningful prior consultation. In this regard, the Working Group underlines the importance of Government and businesses carrying out human rights due diligence and consultation with affected communities, in line with the Guiding Principles, guidance provided by the Committee on Economic, Social and

[38] See www.rio2016.com/en/news/rio-2016-launches-sustainability-management-plan-and-signs-agreement-with-the-un.

Cultural Rights,[39] the Basic Principles and Guidelines of Development-based Evictions and Displacement[40] and the Guiding Principles on Internal Displacement.[41] In the case of indigenous peoples, the Working Group highlights the requirement of free, prior and informed consent regarding relocation, as provided for in the International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169), which Brazil has ratified, and the United Nations Declaration on the Rights of Indigenous Peoples. Where resettlement is unavoidable, international human rights standards require that the people affected be provided with fair compensation and not be deprived of their sources of livelihood.

42. The Working Group was pleased to learn about efforts under way to better address and mitigate human rights impacts of large-scale development projects. In this regard, it noted that the legislative proposal of the government of Minas Gerais regarding persons affected by dams and other enterprises was submitted on 9 March 2016 to the State Assembly for approval.[42] The proposed law aims to ensure the human rights of populations affected by the planning, implementation and operation of dams and other projects. A similar policy was established by decree in the State of Rio Grande do Sul, in 2014. The Working Group commends these initiatives.

43. At the same time, the Working Group noted with concern the developments that seemed to be going in the opposite direction. It learned that a Senate committee had passed a legislative initiative[43] to fast-track the licensing process — from three steps to one step — to make it simpler and quicker to obtain a licence for infrastructure works considered to be in the strategic national interest. The Working Group also learned that the proposed amendments to the Mining Code[44] included the elimination of some environmental protections in relation to areas to be exploited by mining activity and provisions to assign to the relevant mining company the right to use water for its operation without protecting water for human use.

44. The Working Group is also concerned by the increasing use of the legal mechanism, "safety suspension" (*suspensão de segurança*), which allows the president of a higher court, at the request of a public entity, to suspend the legal decision of a lower court to block a development project from going forward by justifying that the project is a matter of public interest.[45] The Working Group was informed by prosecutors that this is an atypical instrument that cannot be challenged once the higher court decision is taken and that it operates in favour of the federal State. This appears to be a disproportionate instrument, the use of which could pit the power of the federal State against affected communities.

45. The Working Group also noted concerns about undue corporate influence on regulatory and policymaking processes and that the Government's capability to oversee business operations may, in some cases, be affected by political financing processes and

[39] See Committee on Economic, Social and Cultural Rights, general comment No. 7 (1997) on the right to adequate housing: forced evictions.

[40] A/HRC/4/18, annex 1, paras. 38-39.

[41] E/CN.4/1998/53/Add.2, annex.

[42] See Brazil, Bill No. 3312/2016, available at www.almg.gov.br/atividade_parlamentar/tramitacao_projetos/texto.html?a=2016&n=3312&t=PL.

[43] See Brazil, Senate bill No. 654/2015, available at www25.senado.leg.br/web/atividade/materias/-/materia/123372/pdf.

[44] See Brazil, Bill No. 5807/2013, available at www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=581696.

[45] See www.stf.jus.br/portal/glossario/verVerbete.asp?letra=S&id=218.

corporate lobbying.[46] Such perceptions have been exacerbated by a series of corruption scandals involving major companies and elected politicians. The Working Group encourages the Government to take measures to address such concerns. In this regard, it notes that, in September 2015, the Supreme Court of Brazil ruled that provisions in the electoral law that allowed companies to make donations to the electoral campaign funds of political parties were unconstitutional and that, for future elections, donations could only be received from public electoral funds and made by individuals.[47] The Working Group noted that the anti-corruption law makes companies strictly liable for the corrupt acts of their employees and that the legal system is investigating corruption. In several cases, public officials, politicians and the chief executive officers of large companies have been held to account for such offences.

VI. Specific issues

A. Indigenous peoples

46. Brazil has about 240 tribes, totalling around 900,000 people, or 0.4 per cent of the population. Thirteen per cent of the country, that is, 690 territories, is recognized as indigenous land, nearly all of which (98.5 per cent) lies in the Amazon region.[48] The Working Group repeatedly encountered human rights concerns affecting indigenous peoples and the Quilombolas, people of African origin. Over past decades, indigenous peoples have been subjected to forced displacement owing to the expansion of agribusiness and large-scale development projects. In addition to concerns related to development projects in Amazonas, the Working Group was alarmed to learn from civil society and federal prosecutors about the lack of effective consultation with indigenous peoples and violent social conflict in Mato Grosso do Sul, perpetrated by armed militias and private security companies in the context of the intrusion of agribusiness on indigenous land and ineffective or incomplete demarcation of indigenous land. Information gathered by the Missionary Council for Indigenous Peoples documented the murders of 138 indigenous persons in Brazil in 2014, almost one third of which (41 murders) took place in Mato Grosso do Sul. The registration of 138 murders in 2014, up from 97 murders registered in 2013, reveals a worrying upward trend.[49]

47. The Working Group is concerned about indigenous land that has not yet been demarcated.[50] The indigenous peoples and civil society organizations with whom it met were anxious about a proposed Constitutional amendment, PEC 215/2000, which would

[46] According to the Superior Electoral Court of Brazil, about 76 per cent of the over R$ 3 billion (approx. US$ 790 million) in donations made during the 2014 election campaigns for the Presidency, the Senate and Congress were made by corporate entities, up from 66 per cent in 2006. See www.tse.jus.br/imprensa/noticias-tse/2015/Janeiro/presidente-do-tse-fala-sobre-financiamento-de-campanha-eleitoral-em-evento-na-republica-dominicana.

[47] See Brazil, Federal Supreme Court, ADI 4650 / DF - Distrito Federal ação direta de inconstitucionalidade, 17 September 2015, available at www.stf.jus.br/portal/jurisprudencia/listarJurisprudencia.asp?s1=%28%40JULG+%3D+20150917%29&base=baseAcordaos&url=http://tinyurl.com/optzm6r.

[48] See http://indigenas.ibge.gov.br/.

[49] See Missionary Council for Indigenous Peoples, *Report: Violence against Indigenous Peoples in Brazil - 2014 Data* (2015), p. 73, available at www.cimi.org.br/File/Report%20Violence.pdf. Based on information requested under the Access to Information Act (Law No. 12.527/2011) from the Special Secretariat of Indigenous Health.

[50] See Brazil, Federal Constitution, art. 231.

transfer decisions on the demarcation of indigenous territories from the Brazilian National Indian Foundation and the President (the executive branch) to Congress. The Working Group queries the appropriateness of such a step and underlines the importance of prompt land demarcation and of upholding the rights of indigenous peoples as provided for in ILO Convention No. 169 and the Federal Constitution. In this regard, the Working Group notes the concerns expressed by Supreme Court Justice Luis Roberto Barroso about the constitutionality of amendment PEC 215/2000. On 23 September 2013, on rejecting an application for an injunction (MS 32262) against PEC 215/2000, he stated that it was "not unreasonable for the authors of the injunction to claim that the constitutional protection of indigenous rights could be undermined by assigning to the competence of the legislature the demarcation of the lands they traditionally occupy". He pointed out that, "in a matter of principle, to make the recognition of a fundamental right subject to the decision of a political majority seems to contradict its own reason for being. ... These rights are included in the Constitution precisely so that the majority has no power over them".[51]

B. Human rights defenders

48. The Guiding Principles on Business and Human Rights recognize the valuable role played by civil society organizations and human rights defenders. Guiding Principle 18 underlines their essential role in identifying and accessing potential adverse business-related human rights impacts, while the commentary to Guiding Principle 26 underlines how States, in order to ensure access to remedy, should ensure that the legitimate activities of human rights defenders are not obstructed. The Special Rapporteur on the situation of human rights defenders stated that laws and policies that explicitly and implicitly protect business interests, both legal and illegal, at the expense of human rights in the Americas are a challenge for States in the region.[52]

49. Human rights defenders in Brazil increasingly face death threats for raising their voices when their rights are compromised by economic interests, as documented in a 2014 Global Witness report[53] that revealed that, out of 116 killings in 17 countries in 2014, 29 occurred in Brazil and were mainly relating to conflict over land ownership, control and use, and were commonly committed by the police and private security providers. Regarding the latter, following a ruling by the First Civil Court of Cascavel, Parana, in November 2015, the Swiss transnational agribusiness company, Syngenta, was required to compensate the family of Valmir Mota de Oliveira, who was killed by Syngenta security guards, provided by NF Segurança, in October 2007, during a protest at a Syngenta research site in Santa Tereza do Oeste, Parana.

50. The Working Group learned about the National Programme for the Protection of Human Rights Defenders, a federal programme that is implemented at the individual state level.[54] In Minas Gerais, it met with five of the 51 human rights defenders currently in the programme and who face difficulties, owing to their work, to uphold the rights of the population against agribusiness, logging and mining companies. They reported a very high level of intimidation, threats, murder and social exclusion and disregard on the part of the police for the issues they contend with. The Working Group learned about the implementation of this programme in Amazonas, where 74 human rights defenders receive assistance. The human rights defenders affected are form indigenous and traditional

[51] See www.stf.jus.br/portal/cms/verNoticiaDetalhe.asp?idConteudo=248972.

[52] See A/HRC/31/55/Add.1, para. 108.

[53] See www.globalwitness.org/en/campaigns/environmental-activists/how-many-more/.

[54] Established by Decree No. 6.044 of 12 February 2007. See www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6044.htm.

communities, poor people living in urban suburbs, women and people of African descent, including from the Quilombo community. Although the human rights defenders with whom the Working Group met appreciated the support, they agreed that the programme could not prevent or address all the threats they faced and they have had to move to other regions because of threats to their lives. The Working Group learned that the programme had a limited budget and few staff, and that some donors considered Brazil a developed nation that was not in need of funding for this type of human rights protection work. The Working Group was informed that the Minas Gerais programme is the most advanced in Brazil. Despite good intentions, as the programme cannot achieve all of its goals owing to funding constraints, this poses questions for the adequacy of protection mechanisms in less well-funded parts of Brazil.

C. Labour rights

51. The Working Group heard from prosecutors, the Ministry of Labour and Employment and civil society about the labour issues in Brazil. It learned about federal government policies aimed at eradicating child labour, such as the 1996 Programme to Eradicate Child Labour, led by the Ministry of Social Development and Fight against Hunger, and the 2004 National Plan for Preventing and Eradicating Child Labour and Protecting the Working Youth.

52. The Working Group learned that the definition of slave labour in article 149 of the Brazilian Penal Code is wider than the definition in ILO Forced Labour Convention, 1930 (No. 29), and includes provisions regarding restriction on freedom; servitude by debt; degrading working conditions; and exhaustive working hours. It also learned about a Senate bill[55] that attempted to weaken the definition by removing the provisions on degrading working conditions and exhaustive working hours, and cautioned against weakening the strong labour protections for which Brazil has been recognized.

53. The Working Group was informed that, in 1995, an interministerial body was launched to coordinate action against slave labour and that the Ministry of Labour and Employment had launched a special mobile enforcement group to work with the police and prosecutors to investigate companies suspected of using slave labour. Companies placed on the so-called "dirty list"[56] that effectively named and shamed companies caught using slave labour in their supply chains were banned from government contracts, their access to credit and public financing was limited and other companies were discouraged from doing business with them. The Working Group learned that the list was an effective tool for making labour records transparent and for holding companies accountable for using slave labour. In December 2014, the President of the Supreme Court of Brazil granted an injunction — filed by the Brazilian Association of Real Estate Developers — ordering the suspension of the publication of the dirty list. Human rights organizations are challenging that injunction. Through a freedom of information request,[57] *Repórter Brasil* obtained from the Ministry of Labour and Employment a list of employers found to have used slave labour between 2012 and 2014[58] and a list of 340 Brazilian companies found to have employees

[55] Brazil, Senate bill No. 432/2013, see www25.senado.leg.br/web/atividade/materias/-/materia/114895.

[56] See Endiscussão, "Lista suja", established by Ministry of Labour and Employment Decree No. 540/2004, available at www.senado.gov.br/noticias/Jornal/emdiscussao/trabalho-escravo/lista-suja.aspx.

[57] Under the Freedom of Information Law No. 12.527/2011.

[58] See list at http://reporterbrasil.org.br/documentos/lista_06_03_2015.pdf.

working in slave-like conditions.[50] The Working Group considers the dirty list to be a useful tool and commends the initiative. It was concerned to learn about the suspension of the publication of the list and noted that the Government has indicated that it would like to reactivate it. While understanding that the legal process must run its course, the Working Group supports lawful actions, like freedom of information requests, to make publicly available information about employers found to be using slave labour. The Working Group hopes that the suspension of the publication of the Dirty List will soon be lifted.

54. The Working Group was also informed about issues relating to health and safety at work, including exposure of agricultural workers to poisonous chemicals that are banned in Europe and that some labour prosecutors would like banned in Brazil. It was also told about problems relating to the increased use of outsourcing, specifically a lack of control and oversight of supply chains, leading to a lack of accountability for abuses suffered by workers in the supply chain. Labour prosecutors reported that, despite the fact that Brazil has ratified ILO Labour Clauses (Public Contracts) Convention, 1949 (No. 94), it was not being adequately implemented or enforced and it should be, particularly in relation to large development projects, as it applies to work carried out by subcontractors or assignees of contracts. The Ministry of Labour and Employment, through investigations undertaken by labour inspectors, oversees compliance with Brazilian labour legislation and ILO standards, and has the power to issue fines in cases where it finds a violation. The Working Group encourages the Ministry of Labour and Employment to ensure that compliance with all ILO standards is effectively monitored.

55. Labour unions are recognized in Brazil and can engage in collective bargaining agreements. The Working Group learned about vaguely worded anti-terrorism legislation that was discussed in Congress (Bill 101/2015), which prosecutors feared would be used to quash legitimate protest, including protests by trade unions relating to working and social conditions. The Working Group was informed that the anti-terrorism legislation (Law 13260/2016) was approved by the National Congress in February 2016, and it underlines the importance of protecting the rights of workers to organize and protest.[51] The Government stated that such rights are protected in the legislation. The Working Group encourages the Government to ensure the independence of trade unions so that they can effectively advocate for workers' rights.

VII. Access to remedy

A. State-based judicial mechanisms

56. Ensuring access to effective judicial mechanisms is essential.[52] Accessible and effective judicial remedies are particularly important in the light of the imbalance between alleged victims and perpetrators of business-related human rights abuse. The 2013 Access to Justice Atlas published by the Ministry of Justice enables anyone to find the correct judicial or other body to which they can file a complaint, while the "ABC of Rights" explains legal terms in accessible language.[53] The Working Group was impressed by the competence and dedication of the Federal Public Ministry prosecutors and state-level

[50] See list at http://reporterbrasil.org.br/wp-content/uploads/2016/02/listadetransparencia_fevereiro2016.pdf.

[51] See "Brazil anti-terrorism law too broad, UN experts warn", at www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16709&LangID=E.

[52] See Guiding Principles 26 and 27.

[53] See www.acessoajustica.gov.br.

prosecutors it met who work independently of the three branches of Government to defend judicial order, the democratic regime and social and individual interests. Some 1,000 federal public prosecutors and 12,000 state-level public prosecutors investigate and initiate legal proceedings against state authorities and business enterprises on behalf of private individuals or communities. In many cases of alleged business-related human rights abuses, public prosecutors assist communities in mediating with companies or submitting law suits. For example, public prosecutors are working with the affected communities to ensure compensation following the collapse of the Fundão tailings dam. The Working Group commends the work of the Federal Public Ministry and considers that a strong and resolute body of prosecutors who are able to challenge decisions taken by public bodies and business enterprises is indispensable. The Working Group also learned about the important work of federal and state public defenders who, according to federal legislation, are charged with "the defence of the prevalence and effectiveness of human rights".

B. State-based non-judicial grievance mechanisms

57. In addition to the courts and administrative tribunals, non-judicial mechanisms play an important role in ensuring access to remedy for business-related abuses.[63] While, in many countries, national human rights institutions are empowered to examine complaints of human rights violations, Brazil does not have an independent national human rights institution.[64] However, there is the National Council on Human Rights, comprising representatives from Government, the Federal Public Ministry and civil society, that has prepared reports on business-related human rights issues.[65] Members of the National Council on Human Rights said that their recommendations are rarely implemented by the Government. There is room for more dialogue between the Government and the National Council on Human Rights and for an independent national human rights institution to be developed in accordance with the principles relating to the status of national institutions for the promotion and protection of human rights (the Paris Principles).[66]

58. The Working Group met the OECD National Contact Point in the Ministry of Finance and learned how its work has been reprioritized by the Government. The National Contact Point is an inter-agency body that examines cases related to alleged non-compliance with the OECD Guidelines for Multinational Enterprises,[67] particularly with regard to labour rights and environmental issues. The Working Group was informed that an obstacle to the effectiveness of the National Contact Point is the reluctance of companies to acknowledge responsibility for adverse human rights impacts. While the Working Group was pleased to hear about the commitment signed by the National Contact Point and some State-owned enterprises to better promote and uphold the OECD Guidelines, it underlines the importance of accountability mechanisms to track progress on commitments made. The Working Group also encourages more State-owned enterprises to commit to complying with the OECD Guidelines.

[63] See Guiding Principle 28.

[64] In 2009, the Committee on Economic, Social and Cultural Rights recommended that Brazil establish an independent national institution for the promotion and protection of human rights, in accordance with the Paris Principles (E/C.12/BRA/CO/2, para. 7); in 2010, the Special Rapporteur on the right to food recommended the same (A/HRC/13/33/Add.6, para 51 (a)); and, in 2012, several States made recommendations to that effect in the context of the first cycle of the universal periodic review (A/HRC/21/11), which Brazil supported (A/HRC/21/11/Add.1).

[65] See www.sdh.gov.br/sobre/participacao-social/cddph.

[66] See General Assembly resolution 48/134, annex.

[67] See OECD, *OECD Guidelines for Multinational Enterprises* (2008). Available at www.oecd.org/corporate/mne/1922428.pdf.

C. Non-State-based grievance mechanisms

59. The Working Group learned about different types of operational grievance mechanisms used by companies and found that the understanding of the value of non-State-based grievance mechanisms was varied. While operational grievance mechanisms are not meant to substitute for judicial mechanisms, in cases of serious human rights abuse they can play an important role in providing access to remedy for individuals or communities who are adversely affected by a business enterprise. The Working Group considers that publicly accessible information about the outcome of operational grievance mechanisms is crucial and is therefore concerned that, in a January 2016 report,[28] it is stated that the ombudsperson of the Brazilian Development Bank (BNDES) provided "no information regarding the content of past or pending complaints, the outcomes of closed cases or the rationale for determinations regarding individual complaints".

VIII. Strengthening the policy framework

60. The Working Group appreciates the initiatives taken by the federal and state governments to promote and protect human rights and recognizes the efforts to strengthen the business and human rights policy framework. It was pleased to hear about the six meetings between 40 representatives of 25 State-owned enterprises and government officials from different ministries, including the Ministry of Women, Racial Equality and Human Rights, the Ministry of Labour and Employment and the Ministry of Culture, to inform an action plan for State-owned enterprises on business and human rights.

61. The Working Group strongly encourages the Government to develop a full national action plan on business and human rights based on the framework of the Guiding Principles on Business and Human Rights, and to use the guidance prepared by the Working Group for the preparation of such action plans. As the guidance document underlines, such plans need to be developed in inclusive and transparent processes. Relevant stakeholders need to be allowed to participate in the development and updating of the national action plan and their views need to be taken into account. Information needs to be shared transparently at all stages of the process.[29]

62. The process of developing a national action plan would help the Government to identify areas of particular risk, decide which laws, regulations, policies and areas of oversight should be prioritized and strengthened, and determine ways to improve the access to remedy for victims of adverse business-related human rights impacts through State-based and non-State-based grievance mechanisms.[30] The Working Group notes that a conference on human rights and business, organized by the Global Compact Network Brazil, Fundação Getulio Vargas and the United Nations country office in Brazil, concluded with the adoption of a statement of support for a national action plan. The statement is to be presented to the upcoming National Conference on Human Rights.[31] The Working Group hopes that its findings and recommendations on opportunities for improvement presented in

[28] See C. Daniel and others, eds., *Glass Half Full? The State of Accountability in Development Finance* (Amsterdam, SOMO, January 2016), available at http://grievancemechanisms.org/resources/brochures/IAM_DEF_WEB.pdf.

[29] See Working Group on Business and Human Rights, *Guidance on National Action Plans on Business and Human Rights* (November 2015), available at www.ohchr.org/Documents/Issues/Business/UNWG_NAPGuidance.pdf.

[30] See Guiding Principles 25-31.

[31] See www.pactoglobal.org.br/Noticia/216/Empresas-participam-da-construcao-de-politicas-publicas-em-direitos-humanos.

the present report will be useful to the process of developing a national action plan on business and human rights.

63. During its visit, the Working Group identified the need for improved coordination and dialogue on business and human rights issues. In particular, there is a need to create platforms for multi-stakeholder dialogue, involving the Government, businesses and civil society. It was clear from its meetings that it is difficult to gather representatives of companies, the Government and aggrieved communities around the same table. Relations between business and civil society seemed tense. As was emphasized by the Secretariat for Human Rights, there is also a need for all ministries to engage more closely with civil society.

64. Federal and state authorities mentioned the difficulties encountered in meeting with the management of businesses, which posed problems for the effective oversight and regulation of business activities.

65. A multi-stakeholder approach involving the Government, businesses and civil society would allow for interests to be balanced and the development of well-informed policy that responds more effectively to the needs and concerns of businesses and persons whose rights may be affected by business activities.

66. An independent civil society and media play an important role in promoting transparency and accountability in business operations, particularly where human rights concerns arise. The continued engagement of the active media and civil society will be essential in advocating for progress and monitoring implementation of the Guiding Principles by the Government and businesses.

IX. Conclusions and recommendations

67. **The Working Group welcomes the commitment of the Government of Brazil to the Guiding Principles on Business and Human Rights and its interest in developing a national action plan on business and human rights. As the Government considers how best to advise businesses, including the many State-owned enterprises in Brazil, in relation to their responsibility to respect human rights, the Working Group stands ready to continue the dialogue on how to overcome obstacles on the basis of best international practice.**

68. **A key finding of the visit was the need to further strengthen the support provided to rights holders to enable them to be in a balanced position vis-à-vis companies and public officials. The affected communities with whom the Working Group met conveyed a sense of vulnerability, isolation and rejection by the decision makers and those with power. The Working Group emphasizes the importance of the Government and businesses listening to the voice of the most marginalized. Deeply considering the opinions and experiences of those affected by, for example, large development projects, is essential to ensuring that human rights are not jeopardized in the pursuit of economic growth.**

69. **The Working Group makes the following recommendations to the Government, business enterprises and civil society organizations.**

70. **The Working Group recommends that the Government:**

(a) **Raise awareness and build the capacity of civil servants and lawmakers on the respective obligations and responsibilities of the Government and all business enterprises, including State-owned enterprises, to prevent and address adverse**

business-related human rights impacts, in line with the Guiding Principles on Business and Human Rights;

(b) Set out clear expectations in relevant policies that all business enterprises in Brazil respect human rights throughout their operations and conduct human rights due diligence in relation to their domestic and international operations;

(c) Encourage the Brazilian Development Bank (BNDES) to ensure that bank-funded projects include safeguards against adverse human rights impacts, in line with the Guiding Principles;

(d) Develop a national action plan on business and human rights on the basis of multi-stakeholder engagement;[7]

(e) Create platforms and strengthen mechanisms for dialogue between Government, businesses and civil society on business and human rights issues;

(f) Include human rights considerations in public procurement policies and include the corporate responsibility to protect human rights in procurement contracts;

(g) Reinforce the importance of compliance with the Guiding Principles on Business and Human Rights and the OECD Guidelines for Multinational Enterprises in relation to domestic and overseas business activity and highlight the progress made by State-owned enterprises that have already committed to such compliance;

(h) Build on the current programmes and policies to combat child and forced labour and avoid weakening safeguards, including the current definition of slave labour;

(i) Conduct a review of access to effective remedy with a view to strengthening judicial and non-judicial mechanisms to identify and address business-related human rights abuses;

(j) In the context of improving access to remedy, require the ombudsperson of the Brazilian Development Bank (BNDES) to provide information regarding the content of past or pending complaints, the outcomes of closed cases or the rationale for determinations regarding individual complaints;

(k) Strengthen the capacity of, the resources allocated to and coordination between the Brazilian Institute of Environment and Renewable Natural Resources and the Brazilian National Indian Foundation in order to strengthen the regulation of large development projects and deliver sustained protection for affected communities;

(l) Enhance the technical capacity and the resources of the Brazilian Institute of Environment and Renewable Natural Resources to enable it to better monitor the social and environmental impacts of large development projects and the fulfilment of any conditions imposed in mitigation plans;

(m) Strengthen the dam inspection activities undertaken by the National Department of Minerals Research so as to improve governmental oversight and prevent further collapses;

(n) Ensure that, where disasters like the collapse of the Fundão tailings dam occur, adequate compensation is provided to all those affected, following full

[7] See the Working Group's guidance on national action plans.

consultation, and that adequate environmental mitigation and remediation measures are carried out;

(o) Apply its best efforts to seek to prevent the deletion of key environmental protections from the Mining Code and also apply its best efforts to seek to ensure that infrastructure licensing processes contain thorough social and environmental considerations;

(p) Apply its best efforts to seek the appropriate level of resources to enable federal and state prosecutors to continue to challenge the actions of companies and public bodies;

(q) Review the current use of the legal mechanism of "safety suspension" with a view to ensuring that it does not amount to an obstacle to access to justice for communities affected by large-scale development projects;

(r) Ensure that rights holders and stakeholders (especially the most vulnerable) who may be affected by development projects receive information, including adequate legal advice, in order to be in a balanced negotiating position with a company;

(s) Apply its best efforts to provide the Brazilian National Indian Foundation with the resources necessary to properly and promptly carry out indigenous land demarcation and also apply its best efforts to seek to ensure that the demarcation of indigenous land remains the responsibility of the executive branch of Government;

(t) Increase resources for the National Programme for the Protection of Human Rights Defenders and place emphasis on alleviating the social, political and economic conditions that place human rights defenders at risk;

(u) Provide enhanced human rights training to staff of ministries, officials responsible for environmental licensing and judges so as to ensure that current legal principles, human rights standards and international best practices are known and applied by decision makers.

71. The Working Group recommends that all business enterprises, including private enterprises and State-owned enterprises:

(a) Comply with their responsibility to respect international human rights by adopting a human rights policy and carrying out human rights due diligence to identify, prevent, mitigate and account for how they address adverse human rights impacts;

(b) In assessing actual or potential adverse human rights impacts, ensure meaningful consultation with potentially affected individuals and communities, paying attention to potentially vulnerable or marginalized groups and ensuring that they have timely and complete information about proposed projects or changes that may affect them and the capacity to put forward their opinions;

(c) Pay particular attention to how human rights risks affect women, children and men differently, especially regarding construction and infrastructure projects involving access to land and the resettlement of communities;

(d) Establish and run operational grievance mechanisms in line with Guiding Principle 31, in order to identify and address adverse impacts;

(e) Engage in the development of a national action plan on business and human rights;

(f) **Engage with the Global Compact Network Brazil and business associations to promote understanding of and to learn from the experiences of implementing the Guiding Principles;**

(g) **Ensure greater focus on safety and contingency plans, particularly companies operating mines and infrastructure development projects, and draw on the United Nations Environment Programme technical report No. 41, "APELL for Mining: Guidance for the Mining Industry in Raising Awareness and Preparedness for Emergencies at Local Level".**[73]

72. **The Working Group recommends that civil society organizations:**

(a) **Continue to raise awareness about the respective obligations and responsibilities of the Government and of business enterprises under international human rights law to prevent and address adverse human rights impacts related to the operations of business enterprises;**

(b) **Consider holding human rights awareness-raising events for government agencies that focus on economic and commercial matters;**

(c) **Continue to champion the rights of affected communities and human rights defenders;**

(d) **Engage in developing a national action plan on business and human rights through multi-stakeholder dialogue, including the voices of affected communities and human rights defenders.**

[73] Available at www.unep.org/pdf/DTIE_PDFS/WEBx0055xPA-APELLminingEN.pdf.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on the Asia Forum on Business and Human Rights

Note by the Secretariat

The present report provides a summary of the discussions held at the first United Nations Asia Regional Forum on Business and Human Rights, which took place from 19 to 20 April 2016 in Doha, Qatar. It was convened by the Working Group on the issue of human rights and transnational corporations and other business enterprises in collaboration with the Office of the UN High Commissioner for Human Rights. The Asia Regional Forum programme, session concept notes, statements and written submissions are available on the Forum website: www.ohchr.org/2016AsiaRegionalForum.

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* Reproduced as received.

I. Introduction

1. The United Nations Asia Regional Forum on Business and Human Rights ("Asia Forum") was held from 19 to 20 April 2016 in Doha, Qatar. It was convened by the Working Group on the issue of human rights and transnational corporations and other business enterprises ("the Working Group") in collaboration with the Office of the UN High Commissioner for Human Rights (OHCHR).

2. The Asia Forum attracted some 400 participants from 60 countries with the programme covering 30 different sessions. The programme included:

- two plenary sessions (opening and closing)
- four training sessions
- 20 parallel sessions led by the Working Group and OHCHR, including four sub-regional sessions and
- four sides sessions organized by external stakeholders.

3. The Working Group decided in November 2012 to organize regional Forums to complement the annual Forum on Business and Human Rights.[1] The Asia Forum followed the 2014 Africa Regional Forum and the 2013 Latin America & Caribbean Regional Forum.[2]

4. In June 2014, in its resolution 26/22, the Human Rights Council welcomed the work of the Working Group in the fulfilment of its mandate, including the convening of regional forums to discuss challenges and lessons learned from the implementation of the Guiding Principles on Business and Human Rights[3] with States and other stakeholders in a regional context.

5. The Working Group is grateful to the Government of Qatar for its support of the Asia Forum.

II. Participation

6. The Asia Forum attracted 400 participants from 60 countries. The large majority came from and worked in Asia.

Registration by stakeholder category	
Business (companies 16 %, business associations 6%, law firms 4%, consultancies 4%)	28 %
NGOs, community members, migrant workers and academia	39 %
National human rights institution	1 %
State	3 %
Trade Union	2 %

[1] See outcome of the third session of the Working Group on the issue of human rights and transnational corporations and other business enterprises, A/HRC/WG.12/3/1, para. 17.

[2] See http://www.ohchr.org/EN/Issues/Business/Forum/Pages/2013ACRegionalForumBusinessandHumanRights.aspx and http://www.ohchr.org/EN/Issues/Business/Forum/Pages/AfricaRegionalForum.aspx.

[3] "Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework", Annex to A/HRC/17/31.

Registration by stakeholder category	
UN/Inter-governmental organization	5 %
Other	5 %

III. Focus of the Forum

7. The Asia Forum programme[1] focused on the three pillars of the Guiding Principles on Business and Human Rights ("the Guiding Principles"):

(i) The State duty to protect human rights against business-related impacts;

(ii) The corporate responsibility to respect human rights;

(iii) The need for effective remedy for victims of business-related human rights abuse.

8. During the two-day conference, participants explored the salient business and human rights issues across Asia, and they identified areas at the national level where accelerated action is needed by States and companies to prevent and address business-related human rights harm.

9. Salient issues discussed at the Asia Forum included:

- the rights of migrant workers
- impacts of large-scale land acquisitions
- garment sector supply chains
- forced and child labour and human trafficking
- the right to privacy in the digital domain
- access to remedy through judicial and non-judicial mechanisms
- mega sporting events
- human rights defenders
- indigenous peoples' rights.

10. Participants also discussed the national and regional application of global business and human rights issues, such as national action plans (NAPs), corporate human rights reporting, corporate human rights due diligence, multi-stakeholder engagement, and the role of the State as an economic actor.

11. Given the diversity of issues across the Asia region - which spans from Saudi Arabia in West Asia, to Indonesia in Southeast Asia, and Japan in East Asia - some sessions had a sub-regional, rights-based and/or sectoral focus in order to examine problems and identify solutions in a concrete manner.

[1] Programme:
http://www.ohchr.org/Documents/Issues/Business/AsiaForum/ProgrammeWithSpeakers.pdf

IV. Opening plenary

12. The opening plenary included introductory statements by the Working Group, the Government of Qatar and the Office of the High Commissioner for Human Rights.

13. Dante Pesce, chair of the Working Group,[5] emphasized the growing convergence around the Guiding Principles in other key international frameworks and initiatives for responsible and sustainable business, including their relevance in the context of implementation of the 2030 Agenda for Sustainable Development. He also highlighted notable uptake of the Guiding Principles in Government policy frameworks; in corporate policies and processes; in reporting and benchmarking initiatives; and by other stakeholders that shape company performance such as investors. While encouraged by this progress, the Working Group expressed concern that business-related human rights abuses continue to occur with seeming impunity, including in Asia. Two major trends were highlighted:

(i) Progress on both judicial and non-judicial remedy for business-related human rights harm remains elusive with limited progress;

(ii) The growing clampdown on human rights defenders and trade unions leaders who raise concerns about the impacts on workers, communities and the environment of government and corporate abuse of power – also well documented in relation to many Asian countries.

14. The Working Group underlined the need to speed and scale up implementation of the Guiding Principles, emphasizing the respective obligations and responsibilities of Governments and business enterprises. It also made the case for Asian Governments and businesses to step up their efforts, noting that implementation of the Guiding Principles presents an opportunity to ensure that business operations and economic development projects do not undermine human rights – and by extension, the social sustainability of Asia's economic "miracle". It emphasized two concrete areas where States, in particular, can ensure greater progress and coherence:

(i) The need for States to "lead by example" and implement the Guiding Principles in the context of their role as economic actors (e.g. with regard to State-owned enterprises).

(ii) The expectation that all Governments take steps to initiate open, multi-stakeholder processes to develop national action plans (NAPs) to implement the Guiding Principles.

15. John Ruggie, former Special Representative of the United Nations Secretary-General on human rights and transnational corporations and other business enterprises, delivered a keynote address.[6] He explained that business and human rights issues lie at the heart of achieving sustainable business models and the social and economic development of nations. He rebuked the approach of some developing countries that "growth was to come first, and then we can talk about rights" saying that this "belief undermines both human rights and sustainable development." He called on Governments and companies in Asia to invest in people (in their health, education and housing etc.) and embrace transparency and accountability. He also outlined how the Guiding Principles – which he authored – are the global authoritative standard for States and businesses to prevent and address business-

[5] Read the Working Group's Opening Plenary statement
http://www.ohchr.org/Documents/Issues/Business/AsiaForum/OpeningRemarksDantePesce.pdf

[6] To read John Ruggie's statement, visit
http://www.ohchr.org/Documents/Issues/Business/AsiaForum/Keynote_statement_JohnRuggie.pdf

related human rights impacts, and that they have expanded their reach to international national bar associations and major sports organizations. On the latter, he referenced his independent report to FIFA and the human rights issues affecting the 2022 Men's World Cup in Qatar including the use of the "kafala" sponsorship system for the employment of migrant labour.[4]

16. Two panel discussions followed,[5] with the first exploring the role and obligations of States in Asia to protect human rights, and the second examining the responsibilities of companies that operate in the region to respect human rights.

17. In the first panel, speakers from the Government of Indonesia, the Viet Nam National Mekong Commission and the International Trade Union Confederation (ITUC) discussed the steps being taken by some Asian Governments to implement the Guiding Principles, such as through NAPs led by national commissions on human rights and through regulation to promote the corporate responsibility to respect human rights. They also discussed how to prevent, mitigate and remedy adverse human rights impacts in situations of development projects in areas where States share access to land and water. In addition, the importance of safeguarding workers' rights was raised and the need to overcome the contradiction whereby workers may be unable to exercise basic rights, such as engaging in collective bargaining, amid increasing calls to strengthen workers' rights to ensure their consumption of goods and services to allow economies to keep growing. The challenges facing migrant workers from the perspective of "sending" and "receiving" countries were also explored.

18. In the second panel, speakers from the ASEAN CSR-Network, International Organisation of Employers (IOE), the Indonesian Global Compact Network, the Japan Sustainable Investment Forum and the International Federation for Human Rights (FIDH) discussed the main internal and external drivers that are leading more companies that operate in Asia to respect human rights and what needs to happen to speed and scale up business uptake of the Guiding Principles. The efforts of Asian-based NGOs to advocate for companies to act more responsibly were raised, as well as the ongoing clampdown on civil society actors in Asia. As was pointed out, the efforts of human rights defenders to raise concerns about adverse business impacts should be viewed as an early warning system to Governments and companies alike. The speakers also examined the role of investors across Asia to ensure that companies, which demonstrate clear respect for human rights, are rewarded with more capital investment and the importance of bringing human rights to the attention of company directors.

V. Main Forum take-away points with regard to the roles of the key stakeholder groups

19. Given the challenge of capturing the breadth of issues covered in the 30 different sessions, the report presents the main findings from the Forum discussions under the headings of the following key stakeholder groups: (a) States; (b) business; (c) civil society organizations and directly affected stakeholders; and (d) national human rights institution (NHRIs).

[4] Read John Ruggie's report: "For the Game. For the World." FIFA and Human Rights": http://www.hks.harvard.edu/centers/mrcbg/programs/cri/research/reports/report68

[5] See the Opening Plenary panel speakers on the programme: http://www.ohchr.org/Documents/Issues/Business/AsiaForum/ProgrammeWithSpeakers.pdf

A. States

20. Naturally, the first pillar of the Guiding Principles – "the State duty to protect human rights" – featured in every session at the Forum. Overall, participants repeatedly stressed that high-level Government commitment and cross-cutting Government strategy to implement the Guiding Principles are required across Asian countries. More specifically, discussions focused on the following concrete ways that such a Government commitment and strategy can be carried out:

1. National action plans on business and human rights (NAPs):

21. Despite the Working Group and others having urged all Governments to develop a NAP (in the form of a stand-alone document or as part of a related policy document) for a number of years, no Asian government has published a NAP yet.[1] Some Asian countries have a NAP process underway, often led by the national human rights institution (NHRI). However, the region is lagging behind others, especially Europe. Participants discussed how to address the NAP gap in Asia and what steps are needed to lay the ground for a meaningful NAP.

22. Language and labels are very important. Speakers stressed that there remains a need to translate human rights concepts into the local context and that for some Asian Governments - especially their ministries/departments in charge of the economy, finance or business relations - the language of "human rights" is not palatable and they prefer to discuss issues of "governance" rather than "human rights". This makes the development of a NAP challenging in countries that do not consider human rights a key part of development and prosperity. To overcome this, the point was made that the business case for the Government to develop a NAP needs to be spelt out more clearly – including addressing the misconception that growth and protection of human rights are not compatible, as highlighted in the keynote speech. It was noted that leveraging the 2030 agenda for sustainable development in national follow-up processes could provide an avenue for potential synergy and greater awareness of the Guiding Principles.

23. It was also noted that NAP processes need to be tailored to local contexts and realities, such as those in many Asian countries with a prevalence of large informal sectors and small and medium sized enterprises (SMEs). It was underlined that there is no one-size-fits-all NAP and that a NAP can be either a stand-alone document or it can be included in other relevant Government strategies. Therefore, conducting a baseline study was considered essential for the effectiveness of a NAP to ensure that it is tailored to the needs of the country and is forward looking and action-oriented.

24. Participants said that Asian States should be encouraged to develop a NAP when they come under review by fellow States during the Universal Periodic Review (UPR) mechanism of the Human Rights Council.

25. Among the international partners playing a role to promote the development of NAPs across Asia, the Working Group is pleased that UNDP is seeking to be more active in Asia-Pacific by supporting NAP processes, including in building the capacity of NHRIs to serve as "champions" to promote NAPs.

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[1] See list of countries that have developed or are in the process of developing a NAP: http://www.ohchr.org/EN/Issues/Business/Pages/NationalActionPlans.aspx.

2. State as an economic actor / the State-Business nexus

26. States are not only law/policy-makers and regulators, they are also owners of companies, invest in and offer credit to companies, and also procure the services and products of companies. It is a reasonable expectation that States, therefore, should lead by example when it comes to implementing the Guiding Principles with an obvious entry point being with respect to state-owned enterprises (SOEs).

27. Participants discussed how governments should have clearer regulations and policies in relation to SOEs' operations, including human rights due diligence requirements, especially on their activities abroad, and requiring mandatory disclosure on their human rights impacts. States should also ensure that shareholding and ownership policies, corporate governance of SOEs and competition policies are updated and enforced so that SOEs fully respect human rights and set a good example. The Working Group referred to its report to the Human Rights Council on this topic and participants agreed that this area warrants much more discussion and focus.[7]

28. Other areas that require further detailed analysis and guidance concern public procurement; State-owned investment funds, such as pension funds; and public private partnerships (PPPs). There is a need to increase policy coherence and stop the "silo mentality" in all these forms of economic activities.

3. Governance gaps

29. The issue of how governance gaps due to Government failures lead to negative impacts on human rights in the context of business activities was raised in a discussion on land acquisitions. Land governance is, in many countries of Asia, characterized by issues of corruption and lack of transparency. Governments, which benefit from land acquisitions, are often complicit in harms that occur in the acquisition of land and the governance of land use and they are routinely absent in their crucial law enforcement role. Similarly, access to State-based remedy is elusive; private interests and those of investors collide with governments; and affected communities are not consulted.

4. The need to ensure access to remedy for victims

30. It has been consistently noted that the third pillar of the Guiding Principles "access to remedy for victims" is where progress is lacking the most and the pillar that requires urgent focus and implementation. The Asia Forum gave specific focus to the situation facing victims of business-related human rights abuses in accessing an effective remedy and it included discussions on a mix of judicial and non-judicial mechanisms as well as new instruments and tools that are being developed.

31. Speakers outlined the familiar challenges with State-based judicial remedy such as: the lengthy court processes; unequal access to the courts for certain groups such as indigenous communities notably because of the huge expense of mounting and maintaining a legal case, and the deficit in linguistic skills; the lack of judicial independence in some regions across Asia; and intimidation of defendants and fear of reprisals against those making a complaint.

32. The efficacy of non-judicial grievance mechanisms was also discussed. Participants explored whether complaints are better addressed in non-judicial fora, such as mechanisms offered by NHRIs, international financial institutions, labour tribunals, ombudsman offices and national contact points for the OECD Guidelines for Multinational Enterprises. It was

[7] UN Document A/HRC/32/45

agreed that all mechanisms need to be strengthened and that all recourse avenues should be available to victims because the circumstances of the abuse vary from case to case and therefore require different responses.

33. Participants cited examples of bringing cases to both the Compliance Advisor Ombudsman (CAO)[11] and the Asian Development Bank. They noted that while these mechanisms have limits in terms of the remedy they can provide to affected communities, in the context of weak judicial systems and rule of law, they can play a significant role. A key issue for such mechanisms is ensuring trust and that they are seen as independent by all parties involved. Another key issue is how to address the safety and security of complainants, as NGOs that raise concerns are often accused by government actors and others of "inciting people to go against the country's development". Reference was made to a draft CAO report on protection of complainants currently out for public consultation,[12] which includes principles such as confidentiality of complainant and consultation with complainants.

34. A discussion on OHCHR's "Accountability and Remedy Project"[13] — which aims to develop credible and practical guidance to States to enhance accountability and access to remedy for victims of business-related abuses, especially severe abuses — explored cross-border cases, including on access to information, as well as financial barriers for legal representation and the need for clear tests to establish corporate criminal liability.[14] Speakers pointed out that corporate criminal accountability in Asia is still in its infancy with limited political will and poor awareness at the grassroots level to promote and utilize the court system for business-related harms. It was noted that the potential for change is huge. However, this requires legal changes to strengthen corporate criminal responsibility and expanding the scope to include extraterritorial jurisdiction; the protection of victims and defenders that raise complaints; and stronger support from international partners especially with regard to public interest / strategic litigation.

35. Finally, there was a discussion on the inter-governmental process to develop a legally-binding instrument on business and human rights. Participants stated that for an international treaty to work, it needs to make a positive contribution to the lives of rights holders. Unfortunately, there are too many international legal instruments that fail in this regard due to low levels of State ratification and lack of enforcement. It was suggested that the treaty process, therefore, needs to clearly define and understand what the specific problem(s) are that a new treaty would seek to address. It was reiterated that the treaty process needs to be consistent with the Guiding Principles and be built upon the "Protect, Respect and Remedy" Framework. Others pointed out that experience of implementing the Guiding Principles can help identify areas where a treaty can add value. It was noted, however, that there is a risk that the slow process to develop a treaty could equally slow down State implementation of the Guiding Principles. In this regard, participants urged Governments committed to the treaty process to show stronger commitment to implementation of the Guiding Principles, including by developing a NAP and signing up to and ratifying existing labour treaties, such as the ILO Protocol on Forced Labour. Furthermore, it was argued that the treaty negotiating process needs to be fully inclusive and reflect the perspectives of victims, civil society, business enterprises and all

[11] The CAO is the independent recourse mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA).

[12] http://www.cao-ombudsman.org/documents/ConsultationDraft-CAOApproachtocomplainantsunderthreatApril2016.pdf

[13] http://www.ohchr.org/EN/Issues/Business/Pages/OHCHRstudyondomesticlawremedies.aspx

[14] The project recommendations were released after the Regional Forum. See UN documents A/HRC/32/19 and A/HRC/32/19/Add.1.

Governments. The point was also made that it should focus on all business enterprises, including State-owned enterprises, not just TNCs.

5. Promoting multi-stakeholder engagement

36. Participants highlighted the lack of opportunities across Asia for the stakeholders who make up the business and human rights movement — including civil society organizations, affected communities, businesses, NHRIs, trade unions, investors and representatives of Governments — to meet and openly discuss challenges and ways to overcome them. The Asia Forum itself demonstrated how effective such exchanges are to all stakeholder groups.

37. It was recommended that Governments should foster a climate of meaningful, multi-stakeholder engagement. The development of a NAP could be used as one vehicle to achieve this. Governments should welcome the NAP process as a practical way to engage with civil society, companies and others on identifying ways to overcome adverse business-related impacts that impede development and long-term prosperity. Regional bodies, such as ASEAN, also have a leadership role to play to promote multi-stakeholder engagement in the development of NAPs by their members. In addition, open dialogue would allow businesses across Asia to better understand their human rights responsibilities and identify leading practices to allow them to prevent, mitigate or remedy harms and better manage human rights risk throughout their operations.

38. It was noted that where the dialogue between business entities and civil society organizations is less advanced, governments have a particularly useful role to play. This may also support companies that are already incorporating the corporate responsibility to respect human rights in their operations. Governments need to show leadership by putting human rights firmly on the corporate agenda. Furthermore, much more attention needs to be given by Governments, business associations and human rights experts to the roles, responsibilities and challenges facing small and medium sized enterprises (SMEs), which are the backbone to many Asian economies.

39. One side session put together by organizations from Japan examined the challenges faced by the Japanese Government and businesses operating in that country in implementing the Guiding Principles. It was noted that moving forward on the Guiding Principles presents opportunities for more effective realization of the sustainable development goals and establishing trust between various stakeholders, as well as an opportunity for Japan as the region's G7 country to show leadership on business and human rights.

B. Business

40. Forum discussions relating to the second pillar of the Guiding Principles — "the corporate responsibility to respect human rights" — focused predominantly on the following areas: (i) systemic challenges faced by companies in Asia in implementing the Guiding Principles; (ii) human rights due diligence in specific sectors; (iii) the value of multi-stakeholder and sector-wide approaches to human rights due diligence; and (iv) corporate reporting on human rights.

1. Systemic challenges faced in implementing the Guiding Principles

41. A considerable, systemic challenge in achieving wide uptake of the Guiding Principles by business in Asia is the prevalence of large informal sectors in many of the region's economies, as well as the challenges presented by the level of economic development in many countries.

42. At the enterprise level, lack of awareness of the Guiding Principles and poor understanding of how the corporate respect for human rights pillar should translate into practice was consistently cited.

43. In addition, while Asian businesses face a greater expectation from actors such as consumers, NGOs and the UN to act responsibly, which may make them more susceptible to adopt the Guiding Principles, other pressures may undercut progress. One example concerns the practice of transnational corporations and the cost-reducing pressures imposed on Asian suppliers, which have a negative impact on labour conditions.

2. Human rights due diligence in specific sectors

44. The Forum included sessions on human rights due diligence processes across different sectors, including the garment and ICT sectors, as well as in the context of land acquisitions across Asia. It also examined the role of multi-stakeholder initiatives.

45. Discussions on protecting and respecting **human rights in the garment sector** in Asia highlighted a number of observations, lessons and recommendations:

(i) Freedom of association is critical, but corruption remains a big hurdle;

(ii) Only a small percentage of the workforce is unionized even in countries where the Government has adopted the core ILO Conventions. Few workers have written contracts, making them vulnerable if there are disputes with employers, or making it impossible for families to get compensation if they die at work;

(iii) Workers are often hired via third parties, they do not get even the legal minimum wage or receive any social security arrangement;

(iv) The garment sector is heavily dominated by female workers, many of whom have left their communities to work in factories in cities and are especially vulnerable to abuse;

(v) Long-term relationships with suppliers and trade unions and increased transparency can produce more sustainable supply chains. However, disclosure of the whole supply chain is often not practically possible, due to the high number of suppliers;

(vi) Brands should play a bigger and more active role in using their leverage to improve the conditions of workers;

(vii) Governments and businesses across Asia should act on their respective duties and responsibilities under the Guiding Principles in the context of Global Goal 8 for Sustainable Development – "decent work and economic growth"[11].

46. Developments in Jordan were given as an example of how progress is possible. Before 2010, 80 percent of those working in the country's garment sector were migrant workers who could not join a collective bargaining arrangement. However, in 2010 the law was changed, enabling migrant workers to join a union and elect leaders, although issues remain with regard to implementation of ILO Conventions. A 2013 sectoral agreement covering all workers in the export supply chain outlined comprehensive conditions for work and living conditions in Jordan's garment sector for the first time. While there was reluctance from employers initially, they soon realized that the process, which is being overseen by the ILO, gave them a platform for dialogue with workers. As of 1 August 2017, the calculation of benefits will be non-discriminatory between Jordanian and migrant

[11] http://www.globalgoals.org/global-goals/good-jobs-and-economic/

workers. It was noted that although much more needs to be done, the action of the Jordanian Government has helped to create a more level playing field for companies in this instance.

47. **In the context of land acquisitions**, it was noted that Government actors are often complicit in and benefit from land acquisitions that take place without meaningful consultation or adequate compensation for affected communities; or they fail to enforce existing laws meant to protect rights-holders. In the absence of strong governance systems and enforcement of national regulations to protect affected communities, there is an expectation that business enterprises should be more proactive and not only respect the law but also bring in higher standards with respect to environmental and social impact assessments, stakeholder consultations, and resettlement compensation remediation.

48. Another key point is that land acquisitions are a complex issue because land is part of the identity and culture of so many communities in Asia (both indigenous communities and small scale farmers), and in many Asian countries (such as in South-East Asia) the local population depends on land and water for its livelihood. Thus, land cannot be viewed as a mere commodity. Resettlement should be avoided at all costs. Speakers also noted that cultural considerations must be included in any process of consultation or resettlement. One example highlighted a complex resettlement process of an indigenous community in Asia where a company was developing a natural gas field and needed to remove sacred stones. This produced the lesson that "it is harder to move the dead than the living."

49. Free prior informed consent (FPIC) also has implications for the company's human rights due diligence process especially as it implies meaningful consultations prior to approval of land acquisitions or projects. FPIC is a key principle for indigenous peoples, but it is often misunderstood or done inadequately. At present, most consultations that do take place are carried out after the project has already been approved or after the business operations have already started. Given the lack of consultation, there is no management plan to prevent or mitigate harm, leading to conflicts and rising costs for all stakeholders including business. Speakers noted that to ensure meaningful consultations, businesses must dedicate enough staff and resources and invest in this process early on. Consultations must also include all groups within a community, in particular women.

50. The discussion on human rights in the **ICT sector** highlighted that all human rights are potentially relevant – from labour rights and issues arising from conflict minerals in the supply chain to the right to privacy. Participants examined the key issues for this sector in Asia, in particular digital surveillance, the right to privacy and freedom of expression online, and internet access for the poor. They reiterated the clear expectation – as set out in the Guiding Principles – that companies across all sectors should have in place appropriate due diligence policies to identify, assess, prevent and mitigate any adverse impacts. Participants also discussed how the ICT sector can contribute to respect, protection and fulfilment of human rights and the role of new "disruptive" technologies.

3. Sector-wide and multi-stakeholder approaches to human rights due diligence:

51. From the outset, participants spoke of the need for more direct business engagement on human rights especially with civil society actors. Sector-wide and multi-stakeholder approaches to human rights due diligence were seen as a particularly promising means of achieving progress.

52. Business speakers emphasized that multi-stakeholder engagement is a key part of corporate human rights due diligence efforts, and noted that the Guiding Principles have provided a common reference point for such dialogue.

53. Multi-stakeholder engagement relies upon trust, a commitment to problem solving, and open two-way communication. In most settings, capacity-building is needed to allow

all relevant parties to participate, and often there is a need for third party involvement or convening.

54. Common challenges that multi-stakeholder initiatives and platforms can help manage include situations where it is not always easy for certain individuals to speak with a counterpart, especially one who is perceived to be more senior or from a completely unrelated field. Such platforms can also provide a space for vulnerable persons, such as human rights defenders who face repressive conditions, to share valuable information with companies that gives a more accurate assessment of the issues on the ground.

55. If the company is directly or indirectly involved in a human rights harm, it was acknowledged that it is more constructive and better for companies to talk with affected communities who are making complaints and raising issues rather than to mainly manage media relations when issues escalate.

56. The experience of sector-wide human rights impact assessments through multi-stakeholder engagement in Myanmar was provided as a potential lesson in other contexts. The influx of foreign investment after the lifting of economic sanctions in the country presented an opportunity to change business and Government practice. Here the involvement of a neutral organization – positioned between the "golden triangle" of government, business and civil society – had played the role of a proxy voice in a situation where the stakeholders had little experience with talking directly to each other. This had helped reduce friction and understanding especially on issues where the different sides traditionally did not trust one another. Sector-wide programmes in the ICT, tourism and oil and gas sectors have shown that there was huge appetite for multi-stakeholder engagement and dialogue. However, given its novelty, external support had been needed. Another challenge was to get companies to understand that they have a responsibility to respect human rights. The complexity of the issues against the need to keep it simple and easily understood in the local language was another significant challenge. The term "collaboration" was cited as the determining success factor for human rights due diligence.

57. The links to the OECD system were also highlighted. It was noted that due diligence is the "name of the game" for the OECD Guidelines for Multinational Enterprises, which include a chapter on human rights that is directly based on the second pillar in the Guiding Principles. The OECD Guidelines require adhering governments to establish non-judicial complaint mechanisms ("the national contact points").

58. While there are only a few signatory governments in Asia, it was noted that the Guidelines are very relevant for the region, since their scope include supply chains and cover a number of business contexts, such as palm oil exported from Asia to OECD countries, OECD countries' investments in Asia, and Asian investment in the USA and Europe. By their integration in the OECD Guidelines, the Guiding Principles are also directly applicable in such contexts.

59. In order to clarify practical implications of due diligence, OECD is preparing sector guidance in different sectors: already there is guidance covering conflict minerals and agriculture, and similar guidance is in progress for the textile and financial sectors.

60. With regard to sectoral due diligence approaches of relevance to Asia, it was suggested there is an obvious need to create new multi-stakeholder partnerships: in particular, a living wage alliance covering the textile sector, an "anti-haze" alliance to tackle the devastating environmental impacts from forest fires to clear land for commercial purposes, and an alliance on responsible recruitment in the construction sector. For such initiatives to be successful, it was stressed that companies must step forward and recognize their responsibility to prevent and address adverse impacts, including those occurring beyond the first tier of suppliers. It was noted that the Guiding Principles clarify once and for all that companies can no longer hide behind the excuse of their complex and multi-

layered supply chains. For such multi-stakeholder initiatives to be effective, participants stressed that collaboration with Asian governments was critical. A practical point concerned how to construct multi-stakeholder initiatives. Depending on the circumstances, they may be set up from the ground as "bottom-up" initiatives, or through existing networks. Depending on the type of issue or challenges, they may involve companies in one particular industry or companies across industries, either within or across regions.

4. Transparency

61. In order to know and show that they respect human rights, there is increasing focus on the importance of companies reporting on their human rights impacts. It was noted that across Asia, there is more and more corporate reporting on non-financial information such as on ESG sustainability, which includes elements of human rights issues. This is thanks in part to requirements from stock exchanges and, to a lesser degree, regulators and pressure from investors such as pension funds.

62. Speakers argued that the next step is to increase the amount and quality of human rights reporting. However, there are a number of challenges in achieving this, such as overcoming the burden that increased reporting would impose on companies, especially SMEs which have fewer resources, to disclose more detail and meaningful information on their human rights impacts. In addition, panellists explained that negative campaigns by NGOs and media stories about a company's conduct – however legitimate – can result in more companies being less willing to report publicly on its human rights impacts.

63. Regulation can help ensure that companies that are not in the spotlight to report publicly on human rights. However, much is still needed to build the capacity of regulators across Asia for this to happen. Panellists made recommendations on how to increase the amount of human rights reporting, including having regulators prepare guidance on how companies report on human rights; the possibility of creating a league table on company disclosure and environmental impact assessments; and not delinking human rights reporting from existing ESG reporting.

C. Civil society and affected stakeholders

64. As well as focusing on engagement with Governments and business, the Forum sought to promote the role of civil society organizations including NGOs, trade unions, campaigners and human rights defenders and, crucially, to hear the voice of victims and affected communities. Throughout the Forum discussions, it became clear that a lot more capacity-building is needed in order to strengthen the role and impact of civil society to drive more responsible business conduct. Participants repeatedly made the point that, bar notable exceptions, civil society organizations across Asia largely struggle to engage meaningfully on business and human rights issues and with the key players – Governments and companies – due to a lack of expertise, experience and capacity. Building capacity to improve this is sorely needed to allow for more targeted advocacy campaigns and collaboration with business to garner positive results and help put the business and human rights agenda firmly on the map.

65. At the same time, the Forum examined the plight of directly affected stakeholder groups who are particularly vulnerable to business-related human rights harm in Asia, namely: (i) Migrant workers; (ii) Indigenous Peoples; and (iii) human rights defenders.

1. Migrant workers:

66. Migrant workers are a dominant feature of the labour market in Asia and the harms they suffer were a large feature of the Forum. According to the 2015 International Labour

Organization statistics, Asia-Pacific hosts 17.2 percent of migrant workers worldwide (some 25.8 million persons).[9] For example, the Arab States – many of which were included in the focus of the Asia Forum - have the highest proportion of migrant workers to all workers (35.6 per cent) and hosts 11.7 per cent of migrant workers worldwide, most of them from Asia.

67. It was noted that migrant worker abuses often start in countries of origin and continue in countries of destination. Migrant workers are vulnerable at every location and at all stages of the process to gain work. In the construction sector in the Gulf region, NGO reports have highlighted huge exploitation in the recruitment process of migrant workers, such as fees paid to get recruited, passports confiscated, poor living conditions, forced labour with threat of penalties such as deduction of pay, prevention of returning home, reported to the police as "absconded workers". In addition, trade union access is poor. Meanwhile, in the textiles sector, migrant workers across Asia urgently need to be afforded the same labour rights, wages, conditions and equal treatment as employees who are citizens of a country. By engaging in discussions with independent trade unions, employers and companies create legitimate partners to ensure complaints are managed and do not cause disruptions to production and reputational risk.

68. In addition, the Forum explored the challenges faced by domestic workers, who are mostly women. For example, in Qatar 90 percent of domestic workers are female. Across the Gulf region only Kuwait has a law on domestic workers. Harms faced by domestic workers in the region include passport confiscation, sexual abuse and bonded labour whereby employers often think they own the worker after they paid thousands of dollars to bring the domestic worker to their country.

69. Forum participants discussed the following ways to protect migrant workers:

(i) The prohibition of recruitment fees to jobseekers;

Mechanisms to monitor this and greater efforts by companies at direct hiring practices;

(ii) More training and information sharing on rights of migrant workers by Governments in countries of origin and destination, such as the Philippines. Greater cooperation between these Governments is also needed;

(iii) More focus on the health of migrant workers, especially after they have arrived in countries of destination and throughout their stay;

(iv) Pro-active efforts by companies to use their leverage across their supply chain to ensure responsible recruitment and treatment of migrant workers.

70. Standard contract, greater law enforcement, better labour inspections and awareness-raising on the part of migrant workers themselves to their rights is required.

2. Indigenous Peoples

71. Two thirds of the world's indigenous peoples live in Asia, which is home to more than 2,000 civilizations and languages. Government and business good practice when it comes to ensuring indigenous peoples' rights is the exception not the rule in Asia. Discrimination against indigenous communities and certain members, including women, is a challenge. Representation and empowerment of IPs requires careful thought. The meaning

[9] http://www.ilo.org/asia/areas/labour-migration/lang--en/index.htm.

[10] http://www.un.org/esa/socdev/unpfii/documents/2014/press/asia.pdf.

of FPIC is still being debated, and in some Asia countries "consent" is substituted for "consultation".

72. From the perspective of a company, engagement activities with indigenous communities – and applying the principles of free, prior and informed consent (FPIC) – take time and require careful thought to ensure trust, clear two-way communication, and the identification of real issues and the people most at risk of suffering harm. It is, however, increasingly considered essential to the long-term success of the company's operation.

73. A particular challenge in relation to indigenous peoples' rights is land acquisitions by business enterprises. The Asia Indigenous Peoples Pact noted that over 70 percent of some 500 complaints received by affected indigenous communities in the past few years were related to land acquisitions and business operations. Indigenous peoples have a special relationship with three natural resources that are of key business interest: forests, water and minerals. In this regard, there are three common issues: (i) a lack of understanding of what land means for indigenous peoples versus an understanding of land as mere property; (ii) a lack of understanding of what IP rights, and in particular their collective aspects, are. FPIC is also widely misunderstood, and (iii) IP women are particularly affected by the loss of land as they are often responsible for the community's livelihoods. In addition, land grabbing is often accompanied by or takes place in a context of militarization (or the use of private military companies) whereby violence against women increases.

3. Human rights defenders

74. A session on human rights defenders explored three separate circumstances in which human rights defenders had been targeted for exposing: abuses and slave-like conditions in the Uzbek cotton growing industry; judicial persecution and extra-judicial killings of land rights defenders in the Philippines; and the challenges facing migrant workers, notably those from Nepal, who work in Gulf countries, South Korea and Hong Kong. Defenders increasingly suffer from selective prosecution and trumped-up charges against them and threats to their lives and livelihoods.

75. The panellists put forward the following concrete recommendations to help ensure that the rights of defenders are protected and that there is more willingness on the part of companies and Governments to accept their work as legitimate early warning signs on the harm that business activities can lead to:

(i) States should enact domestic legislation in accordance with the UN Declaration on Human Rights Defenders[18] to recognise and protect the rights of defenders;

(ii) NAPs should bear in mind remedy and accountability mechanisms for Governments and businesses;

(iii) Complaint systems should guarantee non-reprisals, non-deportation, and general human rights protections;

(iv) More effort and consideration – such as through the development of technology - should be given to create urgent alert assistance, protection and support for human rights defenders at threat, including trial observation with priority for indigenous peoples, women, migrant workers and rural people;

[18] http://www.ohchr.org/EN/Issues/SRHRDefenders/Pages/Declaration.aspx

(v) Companies, via their associations, should be encouraged to develop broader industry-specific and pro-active commitments to combat human rights abuses and the targets against defenders, instead of a passive "do no harm" policy;

(vi) International finance institutions and institutional investors should exercise greater due diligence to ensure that their funded-projects do not contribute to business-linked human rights abuses and reprisals against human rights defenders.

D. National Human Rights Institutions (NHRIs)

76. The Forum included a number of discussions on the importance of NHRIs in Asia in promoting the business and human rights agenda. Participants said that NHRIs can play an important role in raising awareness and facilitating discussions with key stakeholders, including Government, business and vulnerable groups. In addition, NHRIs play a central role in helping States and companies move forward in implementing the Guiding Principles and in developing a NAP. For example, the National Human Rights Commission of Thailand has translated the Guiding Principles into Thai, produced a handbook on human rights due diligence and led a project aimed specifically at the Thai tourism industry. Meanwhile, the National Human Rights Commission of Indonesia drafted its country's NAP, which is under review by the Government. Participants argued that where political leadership is lacking, NHRIs should in conjunction with civil society – and with Government and business input – kick start the NAP development process.

77. However, there are important challenges that need addressing. For example, some NHRIs do not have a sufficient mandate to examine the activities of the private sector, and a Government may not accept or take ownership of a NAP that has been developed by the country's NHRI. In addition, speakers reiterated that it is difficult to speak about NHRIs as one body. They exist in different jurisdictions, and have different mandates, resources and tools at their disposal.

78. In general, Asian NHRIs face a set of common challenges: a lack of autonomy and independence from the Government; a lack of authority and trust to deliver on their promise; and a lack of financial resources. At the same time, many NHRIs have a mandate to provide a grievance mechanism for business-related human rights complaints and the Forum discussed how to strengthen their role. In this regard, it was felt that NHRIs are in a fairly unique position to investigate allegations of abuses and focus on conciliation and mediation between victims and accused parties. They are useful in situations where access to the courts is limited, but this can overload them with cases.

79. Strengthening NHRIs as grievance and remedy mechanisms requires better awareness of and access to NHRI mechanisms, removing both practical and legal hurdles to their use, as well as better coordination between NHRIs in cross-border cases, both bilaterally and through regional and sub-regional networks. While civil society reports a number of positive experiences with NHRI grievance mechanisms, there are still critical gaps in their powers and accessibility, especially for vulnerable groups such as indigenous people and inhabitants of remote rural areas. Home- and host-state NAPs should commit to strengthening the provision of remedy through NHRIs and through multi-NHRI cooperation in line with the Guiding Principles. In relation to adverse human rights impacts on indigenous peoples and small-scale farmers arising from land acquisitions it was noted that some NHRIs in Asia have played a constructive role in handling complaints, including with regard to cases with extra-territorial implications (for example, the Thai, Malaysian, Indonesian and Philippines NHRIs). At the same time, it was noted that many others are not active at all on these issues. In the absence of State-based remedies, communities and NGOs have explored avenues of complaints outside of the State, with some success, going up the supply chain and bringing complaints up to regional organizations and NHRIs in third countries. The role of these institutions could be explored further.

VI. Spotlight on mega sporting events

80. The Forum included two sessions on the impact of mega sporting events in Asia on human rights. Part 1 focused predominantly on the human rights issues associated with upcoming events such as the Tokyo 2020 Olympic and Paralympic Games, the PyeongChang 2018 and Beijing 2022 Winter Olympics, the Qatar 2022 World Cup, as well as recent competitions including the 2016 F1 Bahrain Grand Prix, the 2010 Delhi Commonwealth Games and the 2008 Beijing Olympics. Part 2 focused on the human rights issues surrounding the Qatar 2022 Men's World Cup and the role of FIFA, as the global governing body, in addressing existing adverse impacts and ensuring respect for human rights across its operations and future tournaments.

A. Three main points from the Part 1 session

(a) Sport is a celebration of human achievement and clearly aligned with human rights. Ensuring the protection of, and respect for, human rights at the highest level is no longer a choice but an agreed basis upon which States, sporting committees, and business must proceed to organize mega sporting events in Asia. However, in order to ensure that this commitment translates into concrete action, on-going engagement with those most affected by human rights violations and abuses is imperative;

(b) Momentum for reform to effect change at an international level in mega sporting events in Asia is now there. At the same time, history has shown us that human rights relating to land acquisition, labour, health, freedom of expression and association, have too often been abused. In order to ensure this momentum leads to action in the years ahead, on-going concerted efforts - including through primary contractors using leverage in their supply chains, as well as securing effective remedies - is required;

(c) Moving forward, on-going multi-stakeholder consultation between government, business, trade unions and civil society is necessary to ensure the spirit of sport and the beauty in the game translates into a firm commitment to ensuring the dignity of workers and communities wherever these events take place. In the future, this should begin from the bidding process for games/competitions, continue through its life cycle and become part of the ecosystem of mega sporting events.

B. Three main points from the Part 2 discussion

(a) Football has been described as 'the beautiful game' and evokes emotions unlike any other sport. FIFA as the association at the heart of the game has now committed, through its explicit recognition of the Guiding Principles, to secure systemic changes and greater transparency to set an example of how global sports administration and the management of mega sporting events can secure a corporate responsibility to respect human rights for all those involved in the game;

(b) The 2022 World Cup in Qatar provides an important opportunity for the treatment of migrant workers and workers more generally to become a benchmark for the entire Gulf and Asia region. In this regard, FIFA, the Qatar Supreme Committee for Delivery and Legacy and the Local Organizing Committee in Qatar stated their commitment to ensuring that the dignity, security, health and welfare of workers and communities engaged in the mega sporting events remains paramount, including throughout supply chains. However, this now needs to translate into concrete action, including monitoring, implementing and tracking of this commitment becoming a reality;

(c) In addition to being forward-looking, the approach adopted by FIFA and local organizing committees needs to look back. Grievance mechanisms, which secure effective remedies for victims of adverse human rights impacts and which will safeguard the human dignity of all involved in mega-sporting events needs to remain principal on the agenda to secure real change. Stakeholder engagement needs to be increased and both FIFA and the Supreme Committee stated their commitment to this engagement moving forward.

VII. Conclusions and recommendations from the Working Group

81. **The Working Group was encouraged by the high interest in and support for the Guiding Principles expressed by the wide range of stakeholders who participated in the Asia Forum. These actors – who include affected individuals, Governments, companies, business associations, employers' federations, NGOs, trade unions, NHRIs, lawyers, investors and academia – form a critical part of the business and human rights movement that is needed to scale up action to implement the Guiding Principles across Asia.**

82. **The discussions at the Asia Forum help inform the Working Group's efforts to fulfill its mandate and promote effective implementation of the Guiding Principles worldwide. Based on the inputs from participants, the Working Group would like to make the following overall observations and recommendations:**

(a) **Asia's economic development has been fast paced and has brought massive results. These economic achievements have, however, also left some people behind. The Regional Forum heard about the harsh conditions faced by workers in a range of sectors, including female workers in global garment supply chains, migrant workers, workers in the informal sector, and small-scale farmers and indigenous communities evicted from their land, among others;**

(b) **At the same time, the civil society space (including the space for human rights defenders to play their vital role and the space for freedom of association and collective bargaining) is limited and shrinking;**

(c) **Strengthening the human and social aspects of economic development is critical. Sustainable development is only possible with human rights at the core, which will require a rebalancing of the economic and social pillars.**

83. **There is a need for greater collaboration, new partnerships and concrete action by Governments and companies in Asia to fulfill their respective duties and obligations under the Guiding Principles. Multi-stakeholder engagements involving civil society, business, governments, regional organizations and others hold promise, but they must concentrate on addressing the key human rights challenges.**

84. **As a follow-on from the Asia Forum, the Working Group would like to encourage the creation of properly mandated and resourced initiatives to establish multi-stakeholder alliances to address salient issues in Asia, such as to secure living wages for workers in supply chains, and to protect migrant workers in the context of their recruitment and living conditions and in sectors and countries where they are especially vulnerable.**

85. **All stakeholder groups at the Asia Forum stressed the importance of national action plans on business and human rights (NAPs). These are seen as a means to initiate critical multi-stakeholder engagement, strengthen accountability and access to remedy, and ensure that human rights become an integral part of a country's efforts to promote economic growth and development. The Working Group calls on all Asian States to develop a forward looking NAP to implement the Guiding Principles – be it a**

stand-alone document or a plan that is incorporated in a similar high-level strategy, through transparent and inclusive processes that involve all relevant stakeholders, including business, civil society and affected individuals.

86. The Working Group welcomes the work already done by some NHRIs in the region to promote implementation of the Guiding Principles. It would like to encourage NHRIs in all Asian countries to give more focused attention to the area of human rights and business and promote implementation of the Guiding Principles, including by building their own capacity and that of other stakeholders and supporting the development of NAPs in their respective countries.

87. The Working Group is concerned by reports of continued — and in some instances, increasing — adverse business-related human rights impacts across Asia, including relating to the difficult situation of human rights defenders; the negative impacts on the human rights of communities affected by land acquisitions; the harms suffered by migrant workers in countries of origin and destination; and the violations of core labour rights.

88. The Working Group calls on all Asian States and business enterprises in the region — both domestic and transnational corporations — to meet their respective duties and responsibilities set out in the Guiding Principles: the State duty to protect against human rights abuse, the corporate responsibility to respect human rights and the need to enhance access to remedy for victims. It also calls on home States of transnational corporations to play a more active and constructive role. Other actors, such as regulators, investors and business associations can play a positive role in demanding greater transparency by companies in reporting on human rights risks and impacts, including on how they are being addressed, in line with the Guiding Principles.

89. Regional organizations, such as the Association for Southeast Asian Nations (ASEAN) and the South Asian Association for Regional Cooperation (SAARC), should play a bigger and more prominent part in promoting implementation of the Guiding Principles and ensuring that focus on economic growth does not ignore human rights. UNDP, UNESCWA and UNESCAP can also play a leadership role in promoting the Guiding Principles, including by ensuring alignment and coherence in the context of 2030 Agenda implementation efforts.

90. A particular focus of the Working Group's current work is the need for States to "lead by example" and implement the Guiding Principles in the context of their role as economic actors, such as with regard to State-owned enterprises. This is of high relevance in the context of Asian economies and "state-capitalism", and the Working Group encourages all Asian States to take note of its main report to the 32nd session of the Human Rights Council (A/HRC/32/45) in that regard.

91. The Working Group is particularly concerned by the lack of progress in ensuring access to effective remedy for victims of business-related human rights abuse on the part of Governments and business enterprises. It calls on States to meet their duty to ensure access to effective remedy, through judicial and non-judicial mechanisms, including by addressing barriers to access to justice and strengthening the independence and capacity of the judiciary. All States should implement the recommendations from OHCHR's initiative on accountability and remedy in cases of business involvement in human rights abuses. Companies should establish or take part in joint efforts to set up operational-level grievance mechanisms for directly affected stakeholders that are in line with the effectiveness criteria set out in the Guiding Principles (GP 31). International financial institutions financing operations in

Asia should ensure their grievance and accountability mechanisms are aligned with the Guiding Principles and enable stakeholders to raise concerns without reprisals.

92. The Working Group encourages civil society organizations across Asia to push for Governments to develop NAPs to implement the Guiding Principles and to use and submit information to international human rights mechanisms, such as the Universal Periodic Review (UPR) process, the special procedures of the Human Rights Council and the UN human rights treaty bodies, to raise awareness of business-related human rights impacts in the region, and strengthen the calls on States and businesses to implement the Guiding Principles.

93. The Working Group seeks to organize more regional forums, as the events provide unique platforms for multi-stakeholder dialogue, convening – often for the first time – key stakeholders across a region, so that they can: (i) engage together in a process designed to identify existing challenges to human rights posed by business operations in their region; (ii) consider how the Guiding Principles can be implemented in the best way to address those challenges; (iii) galvanize follow-up action on the issues identified at the regional forum; (iv) and inform global discussions at the annual Forum on Business and Human Rights and efforts to speed and scale up implementation of the Guiding Principles globally.

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Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development

Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on multi-stakeholder engagement across "Protect, Respect and Remedy" – Reflections from discussions at the 2015 annual United Nations Forum on Business and Human Rights

Note by the Secretariat

The present report, submitted pursuant to Human Rights Council resolutions 26/22 and 17/4, provides key insights from two case study-based sessions entitled "Multi-Stakeholder Engagement Across All Three Pillars", which took place on 16 and 17 November 2015 as part of the fourth annual Forum on Business and Human Rights.

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Report of the Working Group on the issue of human rights and transnational corporations and other business enterprises on multi-stakeholder action to protect and respect human rights*

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* Reproduced as received.

I. Introduction and background

1. The Guiding Principles on Business and Human Rights[1] clarify how to operationalize the State duty to protect human rights from business impacts, the corporate responsibility to respect human rights and the need for victims to be given access to effective remedy. While there has been considerable attention on how to step up action on *each* of these three pillars of the Guiding Principles, less treatment has been given to how they interact in concrete situations. This was the focus of discussions at the 2015 annual Forum on Business and Human Rights, from which the present report seeks to transmit the key lessons and insights.

2. The present report provides a summary and insights from two case study-based sessions entitled "Multi-Stakeholder Engagement Across All Three Pillars", which took place on 16 and 17 November 2015 as part of the fourth annual Forum on Business and Human Rights.[2] The purpose of the sessions was to exemplify constructive and meaningful multi-stakeholder engagement and dialogue on good practices, lessons learnt, challenges and innovations found in the complexity involved in implementation of the Guiding Principles across all three pillars of "Protect, Respect and Remedy" Framework. The four case studies included perspectives of different stakeholders (civil society and business, as well as government in two), covered different sectors (industrial infrastructure investment, agricultural production, and retail and garment sourcing), and regions (the Americas, Africa and Asia):

- the "2020 Tea Revitalisation Programme" in Malawi
- the Thilawa Special Economic Zone in Myanmar
- multi-stakeholder engagement to address impacts of the shutdown of the Kingsland garment factory in Cambodia
- the "Fair Food Program" in Florida's tomato growing sector

3. The sessions were convened by the Working Group on the issue of human rights and transnational corporations and other business enterprises, and organized jointly with the Business and Human Rights Resource Centre (BHRRC) and the Global Business Initiative on Human Rights (GBI). The sessions built on a similar session held at the 2014 Forum on Business and Human Rights.[3]

4. The Working Group would like to thank BHRRC and GBI for their collaboration in organizing the sessions and for having prepared a report containing a detailed summary and analysis of the discussions.[4] The present document is based on that report.[5] In the concluding section, the Working Group highlights observations and recommendations for the consideration of stakeholders.

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[1] "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework", Annex to A/HRC/17/4.

[2] Full concept note with details about speakers is available at http://www.ohchr.org/Documents/Issues/Business/ForumSession4/ConnectingThreePillarsOnTheGroundFact.pdf. Videos of the sessions can be accessed via: http://webtv.un.org/watch/session-o-multi-stakeholder-action-forum-on-business-and-human-rights-2015/4615868684001

[3] See A/HRC/29/28/Add.3

[4] See the "Multi-stakeholder engagement across 'Protect, Respect, Remedy'" session report by the Business & Human Rights Resource Centre and the Global Business Initiative on Human Rights (GBI), forthcoming at www.business-humanrights.org and www.global-business-initiative.org

[5]

5. The overall aim of reporting on the thematic sessions is to make available to a wider audience concrete experiences and lessons presented at the Forum in order to build common knowledge and support further efforts to implement the Guiding Principles. The primary purpose in discussing the case studies is to facilitate the exchange of experience and mutual learning among business, civil society and Governments.

6. The Working Group would like to facilitate more such focused and action-oriented discussion around specific cases and experiences. In that regard, it commends the companies, non-governmental organizations and States that shared their experiences and perspectives at the Forum.

7. The work around these sessions was carried out pursuant to Human Rights Council resolutions 17/4 and 26/22, which, inter alia, provides the Working Group with a mandate to identify, exchange and promote good practices and lessons learned on the implementation of the Guiding Principles. Also pursuant to these resolutions, the Working Group is mandated to guide the annual Forum on Business and Human Rights that was established to discuss trends and challenges in the implementation of the Guiding Principles and promote dialogue and cooperation on issues linked to business and human rights, including challenges faced in particular sectors, operational environments and in relation to specific rights and groups, as well as identifying good practices.

II. Explanation of the session topic and objectives

8. Since the endorsement of the Guiding Principles by the Human Rights Council in 2011, a great deal of focus and debate has centred on how each pillar of the United Nations "Protect, Respect and Remedy" Framework is being implemented in practice. Generally speaking, conferences, research, projects and dialogue address the detailed, technical implementation and challenges of delivering on the promise of each pillar. This is necessary and urgent given that implementation of the Guiding Principles is nascent and requires policy, process and practice innovations within complex institutions.

9. Nonetheless, there is often less attention given to instances in which all three pillars of the "Protect, Respect and Remedy" Framework are, or need to be, applied simultaneously to bring about meaningful change. This is problematic, since lack of simultaneous action will only ever lead to partial or passing human rights protection. Neither effective State action alongside bad corporate conduct, nor good quality human rights due diligence alongside lack of access to remedy, nor strong remedial avenues without company capacity to prevent adverse impacts can deliver strong solutions to business-related human rights challenges, especially the most severe and irremediable ones. This holistic application of the Guiding Principles is, arguably, where their power and intrinsic value ultimately lies. As the introduction to the Guiding Principles notes, "[E]ach pillar is an essential component in an inter-related and dynamic system of preventative and remedial measures."[5]

10. The commentary to the General Principles reinforces this point by reminding that "[T]hese Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization."[6]

[5] Paragraph 6, A/HRC/17/4.
[6] General Principles, Annex, A/HRC/17/4.

11. The annual Forum continues to provide an ideal space for stakeholders to share progress and practices, to facilitate peer learning and to contribute to the understanding of the state of play of "on-the-ground" implementation. In light of the relative lack of spaces in which the Guiding Principles are considered collectively, these sessions provided a timely and necessary support for multi-stakeholder dialogue in which all three pillars – "Protect, Respect and Remedy" - are considered in unison.

12. The core purpose of the sessions was to demonstrate the transformative transformational power of approaches to business and human rights that integrate all three pillars of the Guiding Principles, and to inspire practitioners and experts advocates in business, government, and civil society to adopt this approach together, especially where salient human rights risks exist within business operations and supply chains. The sessions sought to:

- identify examples where all three pillars have begun to be applied together via collaboration/ coordination among States, businesses and civil society – with a strong focus on delivering results "on the ground"
- make use of the diverse expertise and perspectives at the annual Forum to support speakers and participants to address challenges they are facing
- identify cross-cutting lessons, challenges, capacity needs and opportunities when seeking to deliver results at a local level via coordinated action
- establish how the Working Group and others can support better coordinated action and collaboration
- encourage multi-stakeholder dialogue and learning about the inter-relationship of "Protect, Respect, and Remedy" – both conceptually and in practice.

III. Overview: case studies involving multi-stakeholder engagement across "Protect, Respect and Remedy"[7]

A. Identifying cases

13. In the months leading into the annual Forum, the Working Group, BHRRC and GBI conducted joint research to identify situations in which all three pillars of the Guiding Principles were being considered and acted upon. The initial research did surface a number of candidate cases, and when selecting from these the organisers focused on profiling examples that when considered together:

- addressed a diversity of industries and geographies
- demonstrated engagement from diverse actors including large global brands and smaller domestic suppliers; diverse ministries/agencies in home States and host States; international and local NGOs; worker organisations and community organisations; and affected individuals
- initiatives and programmes at different stages of maturity and evolution.

[7] Background papers are available at www.ohchr.org/EN/Issues/Business/Forum/Pages/Submissions.aspx.

14. Note that the research and identification process was very basic. Broader and more sustained efforts are needed to identify such cases, with particular attention to where national and local government agencies have stepped into leadership roles.

B. Case study one: "2020 Tea Revitalisation Programme" – Malawi

15. The first case presented was the "Malawi 2020 Tea Revitalization Programme", a multi-stakeholder partnership aimed at delivering a living wage for workers in the Malawi tea growing sector. A core issue is that many workers, especially women, are not able to work their way out of poverty, even in productive and profitable supply chains.

16. The Ethical Tea Partnership, which comprises 40 companies that buy and trade tea, suggested that, despite the attention to audits, certifications and paying legal wages, companies did not fully understand the problem. When presented with an evidence-based analysis carried out by Oxfam, however, companies begun to realise that a national minimum wage did not mean that workers earned enough to meet their family's basic needs. It was noted that all actors – companies, local tea producers, the Government, non-governmental organizations and trade unions – had to be involved if improvements, such as a move to a living wage, were to be made. The approach taken by Oxfam of helping companies to deal with the findings in a transparent manner and without shaming those who stepped forward to tackle the issue was considered as constructive by the involved parties.

C. Case study two: Thilawa Special Economic Zone (SEZ) – Myanmar

17. The second case was that of the Thilawa Special Economic Zone in Myanmar, a development project that affected 81 households and led to negative human rights impacts, including relocation and the loss of farmland, livelihood, educational opportunities and access to clean water. Before 2012, the Government of Myanmar, through its role in the project management committee, had found it difficult to establish dialogue and trust between stakeholders, owing to factors such as political and legal changes, challenges relating to the issue of land rights and relocation and the lack of experience in government-community dialogue and communication. Nonetheless, with the support of external organizations, progress had been made notably through the appointment of community mediators, the launch of a multi-stakeholder advisory group, and cooperation with both local and international civil society organizations as trusted third parties. Improved communication and negotiation, continued sensitization on rights and responsibilities, and replicating the Thilawa model in other special economic zones and resettlement programmes were seen as important next steps.

18. The relocation of the affected community brought economic hardship, loss of land and no alternative training; however, the establishment of a community-driven operational grievance mechanism eventually resulted in some improvements. The mechanism was seen as a bridge between communities and the Government and companies involved, and a relatively easy way to provide remedy. This view was shared by the Government's joint venture partner, the Myanmar Japan Thilawa Development Ltd. The introduction of community advisers and the multi-stakeholder advisory council had helped to ensure sustainable company-community engagement. The Myanmar Centre for Responsible Business, which became involved as a facilitator, had found that initially there was no joint platform for stakeholder dialogue, and thus a common understanding of the problems and possible solutions were difficult to reach. One of the first tasks had been to conduct stakeholder mappings and to create mechanisms by which challenges could be raised and addressed. Other challenges included identifying reliable sources of information, and the

country's complex and fluid legal system. The development of guidelines on responsible conduct for companies joining the project was seen as an essential tool. Key elements of the guidelines included reference to the Guiding Principles and to ILO standards, the Government's expectations and the concerns held by the community.

D. Case study three: Labour rights in Florida's tomato growing industry – United States of America

19. The third case was the Fair Food Program in tomato growing sector in Florida (United States of America), covering the entire value chain from workers to food brands and retailers. Currently covering almost the entire sector in Florida, and with a record of having eliminated previous practices of forced labour, sexual assaults and trafficking, the Program is considered a success by workers, companies and the Government. In the experience of the Coalition of Immokalee Workers, which founded the Fair Food Program, it was critical to build a system of enforcement based on a number of mechanisms, including:

- the development of a worker-driven code of conduct for company commitments to be based on the problems experienced by the workers;
- worker-to-worker training to develop an "army of worker monitors";
- a worker-led mechanism to address grievances;
- in-depth audits to complement worker monitoring;
- market consequences for growers and retailers established through legally binding contracts between Coalition of Immokalee Workers and food brands.

20. The Compass Group, a participating company, had found the subtle "carrot and stick" approach adopted by the Coalition of Immokalee Workers compelling and workable, and that, although changing company practice did not happen overnight, it was able to expand the Fair Food Program across other sectors. The experience of the United States Department of Labor, which oversees compliance of agriculture labour standards across the country, was that multi-layered supply chains had made it difficult to establish responsible parties; however, the Fair Food Program, as a leading example of worker-driven enforcement in collaboration with companies, had helped to complement and support government enforcement of standards.

E. Case study four: Multi-stakeholder in the aftermath of the Kingsland factory closure – Cambodia

21. The last case study presented concerned the Kingsland factory in Cambodia, where a subcontractor of a supplier to the company H&M closed down one of its factories in 2012, leaving workers without work and pay. Although the supplier's use of the subcontractor breached its agreement with H&M, which technically did not have any direct legal liability, the company decided that it could help to improve the situation. Through engagement with non-governmental organizations, the Cambodian Arbitration Council, the Government and ILO, workers were compensated. H&M took steps to clarify its expectations to suppliers and set up, in collaboration with trade unions, a whistle-blower system. The case demonstrated the value of workers asserting their rights and pushing large companies to become involved. Participants pointed out that there could be no replacement for worker representation and that dialogue involving all parties – workers, the brand company, suppliers, the Government and ILO – was vital.

IV. Reflections from the Forum sessions on "Multi-stakeholder engagement across all three pillars"

22. Several insights and lessons learned were derived from the discussions at the "Multi-stakeholder engagement across all three pillars" sessions. As a whole they attempt to reflect the state of play of multi-stakeholder engagement across the "Protect, Respect and Remedy" Framework – albeit with a small sample of four cases. The observations are as follows.

23. **The "Protect, Respect and Remedy" Framework is a valuable reference point for multi-stakeholder efforts even if it is not the initial impetus for action**. The initiatives discussed during the annual Forum were not established to implement the Guiding Principles per se. Arguably, this is also the case for a wide range of policies, practices and projects (whether of States, business, or civil society) presented at the Forum. Nonetheless, the stakeholders presenting cases in these sessions all made it clear that the three-pillar framework and substance of the Guiding Principles can function as a reference point to support everyone involved to confront their duties/responsibilities, enhance thinking about ways forward and assist with further calibration of the respective roles, and expectations, of each stakeholder. This somewhat seamless link to existing – and in some instances well established – social change efforts on the ground arguably confirms that the Guiding Principles are not only grounded in international human rights law but also resonate with approaches to local problem solving.[5]

24. **There is no one-size-fits-all formula for what or who triggers collective action:** Based on the experience of the cases/efforts presented in these sessions, local multi-stakeholder efforts are initiated in response to various issues and by diverse actors. The impetus for action that involves all stakeholder groups can come from a range of issues, including: a demand for remediation/investigation from rights-holders around a standard linked to public financing; recognition that existing sustainability/development projects have "orphan" human rights issues that no stakeholder wants to tackle; the failure of a business partner to respect rights; or an investigation into a specific issue. Related, in the cases discussed the initial leadership came from diverse sources, such as local workers or communities, international NGO research campaigns or as a result of corporate human rights due diligence. While this may be a function of the cases discussed, it is worth noting that none of the collective action efforts appear to have been triggered by the State.

25. **Trusted evidence is key to overcoming stand-offs and paralysis, but reaching a meeting of minds takes work on all sides, and leadership from individuals is needed:** Some of the presenters in these sessions explicitly noted that prior to the efforts they are now involved in, there was a feeling of stand-off between stakeholders and an impasse on progress. In the face of this, establishing a trusted evidence base to understand the realities on the ground appears to be key. This can unlock unhelpful perceptions which make all actors feel comfortable that they are doing their part, and someone else is the problem. The investment in creating this evidence base may often come from civil society conducting credible, neutral research and engaging with rights-holders. However, even with an evidence base, it appears it is not always easy to achieve a shared analysis of the problems and ways forward. In all the cases discussed, presenters expressed appreciation for how other stakeholders came to the table with a positive, patient, direct and constructive attitude

[5] Indeed, as former Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, underlined in the introduction to the Guiding Principles (paragraph 11 of A/HRC/17/31): "In short, the Guiding Principles aim not only to provide guidance that is practical, but also guidance informed by actual practice."

when engaging with the original evidence. However, it was also noted that this was often due to the leadership, character and will of key leaders who then worked to bring along colleagues and peers.

26. **Achieving real engagement with tangible outcomes when government, business and civil society work together seems to require certain key elements even in diverse cases:** The four cases discussed across the two sessions are at different stages of development. Nonetheless, it was possible to discern some key elements that underpin real action and progress. Note that the older and more mature the initiative, the stronger – or more binding and public – the elements appear to be. Common threads included:

(a) **Explicit agreements** - All parties need to engage in a written agreement that sets out shared goals and modes of working. In some instances, this may be a memorandum of understanding. In others, it might be a legally binding contract.

(b) **Holistic and detailed action plans** - A diversity of interrelated actions and projects ranging from policy/legal changes to capacity building efforts to effective monitoring need to be planned even when targeting one human rights outcome. For each of these, detailed work setting out what each actor is expected to do is required.

(c) **Time and money** - One case presented set out a 10-year time horizon for success. One company representative noted that reaching internal agreement to engage and take a specific course of action inside large organisations takes time. Another presenter referenced that achieving full labour rights protection for one product in a finite number of farms cannot be done "on the cheap". In other words, addressing challenges as complex as those discussed will take substantial time and money, even in situations where there are willing actors from diverse stakeholder groups.

(d) **Tracking and monitoring** - Each of the presenters discussed the importance of tracking progress against action plans and goals agreed. This includes retaining an appreciation for how much more work is needed, but also recognition of tangible achievements along the way.

(e) **Mutual accountability and enforcement** – A challenge for any multi-stakeholder effort is ensuring that everyone is accountable, in a real sense, for delivering on their duties and responsibilities. One of the presenters from a more evolved case example articulated that binding requirements are critical to enable rights-holders to seek remedy if commitments are not met.

(f) **Shared learning and knowledge creation** – Several presenters noted that agreements and action plans to which diverse actors and institutions are committed can provide a framework and "container" in which shared learning occurs, and help create new shared knowledge not previously captured by any one actor. In more established examples of collective action, this includes the ability to learn from and discuss failed efforts or sub-par outcomes.

27. **Change will often require broad-based, organised action and building/supporting the capacity of the key stakeholders to sustain engagement.** Although a few actors may initiate, direct and drive local multi-stakeholder action, making progress on specific cases requires buy-in and coordinated action from a wider number of actors. Beyond the challenge of building commitment to new behaviours, incentives and practices, presenters also shared the need to define implementation arrangements so that each actor is clear about their role and relationship to others. Further, the eco-system of actors/institutions may lack certain capacities. For example, one presentation outlined the need for mediators to support dialogue between rights-holders, business and the State.

28. **Putting the human rights, experiences and voices of affected individuals and communities at the core of local multi-stakeholder projects is critical and possible, but**

not easy. In each of the cases presented, speakers referenced the importance of direct engagement with rights-holders – whether growers, workers in the supply chain or affected communities – into the multi-stakeholder effort. On the one hand this is about ensuring that the third pillar of the Guiding Principles, access to remedy, is activated into projects and processes from the beginning. On the other hand, it is about meaningful consultation with potentially affected groups, integrating the knowledge and know-how of rights-holders into the crafting of new policies, rules, standards or business practices, as set out in the second pillar of the Guiding Principles. At the same time, it is clear that direct engagement with rights-holders can require the support of interlocutors (especially from civil society or worker organisations) who are committed to investing resources and support to amplify key voices. A related observation is that business representatives valued engagement from rights-holders that was systematic and focused on concrete outcomes.

29. **Some lessons learned by business leaders on how "carrot and stick" approaches may bring about and sustain constructive multi-stakeholder engagement**:

- while audits and certification schemes may indicate that suppliers are meeting standards, these may not pick up the underlying systemic structural issues, and NGOs can play a key role in bringing these to light, and thus informing human rights due diligence;
- business leaders recognize that the "carrot and stick" approach that rights groups and civil society organisations can play a constructive role. Such strategies/tactics might even provide opportunities for business leaders to leverage suppliers and the wider industry;
- sometimes the company needs to use its leverage – indeed use a "carrot and stick" approach – to bring stakeholders and interest groups to the table and get their buy-in to the vision of multi-stakeholder solutions that work.

30. **The engagement of government is critical, and the State has entirely unique capabilities to bring to bear to address critical and urgent business-related human rights challenges**. Across each of the cases presented and issues discussed it was clear that – consistent with the Guiding Principles – government needs to be active in supporting local efforts. It is not enough to set only high-level policy aspirations and expect stakeholders to resolve issues. For example, only government can set investment policy, establish social and environmental safeguards around public financing standards, create and enforce the right legal and policy framework, and scale successful efforts. Further, the cases demonstrated that even when addressing one specific issue or a set of human rights issues at a sub-national level, diverse aspects of government must be around the table. These include different ministries, as well as local and federal departments/leaders, and home and host State representatives. This need for diverse government representation reflects the sheer size and complexity of some of the issues that the cases presented at the Forum are seeking to address.

31. **The annual United Nations Forum can serve as a platform for individuals and organisations to present their local work and challenges**. As well offering valuable insights about the dynamics of local action across all three pillars of the Guiding Principles, it was noted that the Forum allows stakeholders who are not regularly invited to present at the United Nations to talk about their issues and work. It was noted that participation in the Forum provides, among other things:

- an impetus for presenters to establish shared lessons, challenges and priorities;
- a rare opportunity to engage as a group with international experts and gain guidance/ideas about ways forward; and
- a chance to profile work in order to build support to deepen or scale up projects.

V. Working Group conclusions and recommendations

32. The Working Group welcomes the constructive contributions of the stakeholders that shared their experiences of joint engagement to address specific human rights concerns in the context of business operations. It has received feedback from a range of Forum participants that these sessions were a useful and innovative part of the programme. The Working Group is planning to continue its efforts to identify cases of multi-stakeholder action to implement the Guiding Principles across all three pillars, and to facilitate dialogue for wider dissemination of lessons learnt and "cross-fertilization" at the annual Forum also in 2016 and beyond.

33. The Working Group considers that the kinds of approaches featured at the Forum, focused as they were on finding solutions and improving situations in local contexts, should be emulated to a much greater extent. When there is genuine engagement from all sides, significant progress can be made in preventing and addressing human rights impacts of business activities.

34. Recommendations to civil society organisations:

(a) As demonstrated by the cases presented at the annual Forum, NGOs can play a particularly helpful role in helping to establish facts concerning business-related human rights impacts in concrete situations and supporting trust-building and stakeholder dialogue to prevent and address negative impacts. Often such constructive engagement may arise from investigative efforts to shed light on human rights concerns and negative impacts, but where companies are willing to engage with NGOs on such findings, it is clear that all parties stand to gain. At the same time, where companies are not willing to engage with civil society and affected stakeholders in addressing concerns, the traditional approaches of campaigning, "naming and shaming" and litigation will still be valid and may also provide additional incentives for companies' action;

(b) In order to encourage further learning and the spread of innovative engagement between NGOs, business and governments to address concrete business-related challenges, the Working Group would like to encourage NGOs to share more examples of joint efforts undertaken in specific cases at future sessions of the Forum.

35. Recommendations to business enterprises and organisations:

(a) Effective stakeholder engagement to understand human rights risks to individuals and communities is a core element of human rights due diligence processes, and all companies across all sectors – and especially those that are less familiar with working closely with civil society organisations and affected communities and workers – should learn from successful multi-stakeholder engagement efforts, such as those featured at the Forum;

(b) The Working Group would also like to encourage companies and business and industry organisations to share more examples of joint efforts undertaken in specific situations and actively contribute to lesson-sharing and dialogue around such engagement at the annual Forum.

36. Recommendations to States:

(a) Effective multi-stakeholder engagement has great potential for leading to better protection of human rights in the context of investment projects and supply chains, as a means for affected stakeholders to voice concerns, support human rights due diligence, and jointly tackle negative impacts – and thereby building trust and lowering conflict, and eventually leading to more sustainable development outcomes

in which human rights are protected and respected. Host States have a particular role – and obligation – to contribute to such engagement through active participation in stakeholder mechanisms, support to affected stakeholders, clear guidance and expectations to companies, and a conducive environment for NGOs to help identify human rights impacts and support multi-stakeholder dialogue. Home/donor States also have a responsibility to support such engagement;

(b) The Working Group calls on more Governments to play an active role in dialogue at the annual Forum to share experiences and perspectives on multi-stakeholder engagement to address business-related human rights challenges in concrete local contexts. It also encourages Governments to support efforts to research and promote lessons from case studies of multi-stakeholder engagement across "Protect, Respect and Remedy".

37. Recommendations to all stakeholders:

(a) The Working Group encourages all stakeholders to highlight existing, concrete practices of joint stakeholder engagement to address challenges across the "Protect, Respect and Remedy" Framework, and to share such examples in other relevant contexts such as regional forums and meetings convened by stakeholders themselves.